APPENDIX A

Agricultural Marketing Agreement Act, 7 U.S.C. § 601 et seq. Sections 601, 602 in pertinent part, 608c(1), (3), (4), (5), (7), (9), (15), (16) (A), of Agricultural Marketing Agreement Act of 1937

§ 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, § 1, 48 Stat. 31; June 3, 1937, c. 296, §§ 1, 2(a), 50 Stat. 246.

§ 602. Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this chapter which has for its purpose the maintenance of prices to farmers above

the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

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§ 608c. Orders regulating handling of commodity—Issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

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Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof

will tend to effectuate the declared policy of this chapter with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year. In the event a producer holding a base allocated under this clause (d) shall reduce his marketings, such reduction shall not adversely affect his history of production and marketing for the determination of future bases. Allocations to producers under this clause (d) may be transferable under an order on such terms and conditions as may be prescribed if the Secretary of Agriculture determines that transferability will be in the best interest of the public, existing producers, and prospective new producers. Any increase in class one base resulting from enlarged or increased consumption and any producer class one bases forfeited or surrendered shall first be made available to new producers and to the alleviation of hardship and inequity among producers. In the case of any producer who during any accounting period delivers a portion of his milk to persons not fully regulated by the order, provision may be made for reducing the allocation of, or payments to be received by, any such producer under this clause (d) to compensate for any marketings of milk to such other persons for such period or periods as necessary

to insure equitable participation in marketings among all producers. Notwithstanding the provisions of subsection (12) of this section and the last sentence of subsection (19) of this section, order provisions under (d) above shall not become effective in any marketing order unless separately approved by producers in a referendum in which each individual producer shall have one vote and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk

purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided,* That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Marketing orders applicable to milk and its products may be limited in application to milk used for manufacturing.

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Terms common to all orders

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

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Orders with or without marketing agreement

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal

or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agree-

ment or order, in the production or market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

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Petition by handler for modification of order or exemption; court review of ruling of Secretary

(15)(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance wtih regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering

to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

Termination of orders and marketing agreements

(16)(A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

Pertinent Portions of the Secretary's 1964 Order for the Massachusetts-Rhode Island Milk Marketing Area (7 C.F.R. §§ 1001.70 and 1001.72)

PAYMENTS—GENERAL

§ 1001.70 *Payments to producers.*

(a) On or before the 5th day after the end of the month, each handler shall pay each producer for the approximate value of milk received from him during the first 15 days of the month. This payment shall be at a rate not less than the applicable zone Class II price for the month.

(b) On or before the 20th day after the end of the month, each handler shall make final payment to each producer for the total value of milk received from him during the month at not less than the basic blended price per hundredweight computed under § 1001.64, adjusted by the zone, butterfat, and farm location differentials applicable under §§ 1001.62, 1001.71, and 1001.72, minus the amount of the payment made to the producer under paragraph (a) of this section.

§ 1001.72 *Farm location differentials.*

In making the payments to producers required under § 1001.70, each handler shall add any applicable farm location differential specified in this section.

(a) With respect to milk received from a producer whose farm is located within any of the places specified in this paragraph, the differential shall be 46 cents per hundredweight, unless the addition of 46 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

CONNECTICUT

All of the State of Connecticut east of the Connecticut River and the towns of:

Granby. Suffield.

MAINE

The towns of:

Eliot. Kittery.

MASSACHUSETTS

All counties other than Berkshire County.

NEW HAMPSHIRE

Rockingham County, and the following cities and towns: Allenstown, Amherst, Barrington, Bedford, Bow, Brookline, Chichester, Deering, Dover, Durham, Epsom, Francestown, Goffstown, Greenfield, Greenville, Hinsdale, Hollis, Hooksett, Hudson, Lee, Litchfield, Lyndeborough, Madbury, Manchester, Mason, Merrimack, Milford, Mount Vernon, Nashua, New Boston, New Ipswich, Pelham, Pembroke, Pittsfield, Rochester, Rollinsford, Strafford, Temple, Weare, Wilton, Winchester.

RHODE ISLAND

All of the State of Rhode Island.

VERMONT

The towns of:

Guilford, Halifax, Readsboro, Vernon, Whitingham.

(b) With respect to milk received from a producer whose farm is located within any of the following cities and towns, the differential shall be 23 cents per hundredweight, unless the addition of 23 cents gives a result greater than the Class I price determined under §§ 1001.60 and 1001.62 which is effective at the plant at which the milk is received. In that event there shall be added a rate which will produce that price.

MAINE

Berwick, Kennebunk, Kennebunkport, Lebanon, Lyman, North Berwick, Sanford, South Berwick, Wells, York.

MASSACHUSETTS

Becket, Florida, Hinsdale, Otis, Peru, Sandisfield, Savoy, Washington, Windsor.

NEW HAMPSHIRE

Antrim, Barnstead, Bennington, Boscawen, Bradford, Canterbury, Chesterfield, Concord, Dublin, Dunbarton, Farmington, Fitzwilliam, Gilmanton, Gilsum, Hancock, Harrisville, Henniker, Hillsborough, Hopkinton, Jeffrey, Keene, Loudon, Marlborough, Middleton, Milton, Nelson, Northfield, Peterborough, Richmond, Rindge, Roxbury, Sharon, Somersworth, Stoddard, Sullivan, Surry, Swanzey, Troy, Webster, Westmoreland, Windsor.

VERMONT

Brattleboro, Brookline, Dover, Dummerston, Marlboro, Newfane, Putney, Wilmington.

From the Secretary's Decision, 29 F.R. 11205 Promulgating the Mass.-Rhode Island Milk Order, Aug. 4, 1964

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4. *Farm location differentials.* The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order.

A group of nine cooperative associations, which represents principally producers whose farms are located outside any of the specified farm location differential areas, proposed that farm location differentials be eliminated under the New England orders. Three other cooperative associations proposed that a producer whose farm is located within New England and who is presently eligible to receive a farm location differential (either 46 cents or 23 cents depending on the location of the farm) under any New England order be eligible to receive the same differential irrespective of the New England order under which his milk is pooled. Another cooperative association proposed that the farm location differentials be increased as an offset to any reduction made in the city plant Class I zone differentials under the orders.

Farm location differentials represent payments of 46 cents and 23 cents per hundredweight to producers whose farms are located in specified "nearby" and "intermediate" areas, respectively, in addition to the applicable zone blended price which these producers receive. The payments are met by deductions from pool funds. The additional returns to producers who are eligible for these differentials are, in essence, monies which, in the absence of such differentials, would accrue through the blended price computation to all producers, including more distant producers.

Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.

While considerable testimony in support of removal of the provisions was received, it was not established that the farm location differential provisions are resulting in unstable or disruptive marketing conditions which warrant their deletion from the orders at this time. Although certain marketing problems in the nearby and intermediate market areas were referred to in the testimony, these problems are not the result of production increases on farms in these areas which logically might be attributable to the higher returns to producers in these areas. Such increases have not been significantly different from those on farms not eligible for the farm location differentials.

During a period of general incerase (sic) in milk production throughout the milksheds of the New England markets, the average daily milk deliveries per farm for those farms

located in the farm location differential areas under the Boston order and for those farms located outside such areas both increased 23 percent in 1962 over the average of such deliveries in 1960. In the Southeastern New England market the average daily deliveries per farm for those farms located in the differential areas increased about 16 percent in 1962 over 1960 while such deliveries from farms not located in any differential area under the Southeastern New England order increased about 13 percent during this period.

Comparable percentage figures for Connecticut market producers for this period are not available. A comparison of 1961 with 1960, however, shows that there was an increase of 8 percent in the average daily deliveries per farm for those farms located in the differential areas and an increase of 13 percent in such deliveries for those producer farms located outside the Connecticut differential areas. In the Springfield market the average daily deliveries per farm for those producers in the differential areas increased about 18 percent during the 1960-1962 period. In this market very few farms are located outside the differential areas. Such increase of 13 percent is not out of line with comparable increases in the other markets, however. In the Worcester market such daily average deliveries from farms located in the 46-cent differential area (there is no 23-cent differential area under the Worcester order) increased about 17 percent during this two-year period while such deliveries per farm located outside such differential area increased about 32 percent.

The average number of producers with farms located in the farm location differential areas is decreasing in the Boston, Springfield, Southeastern New England, and Connecticut markets. The farm location differential area under the Worcester order was expanded in September 1960 and this caused an increase in 1961 over 1960 in the average number of producers who were eligible to receive such

a differential. The average number of such producers decreased in 1962 from such number in 1961, however.

Marketing problems which have been attributed to the farm location differentials do not relate to the rates of the differentials as such but rather to the changes in applicable differential rates which often occur for producers when they are shifted from one market to another. Problems of this kind, however, are dealt with by the proposed merger of orders. Further, an unwarranted decrease in returns to nearby producers would result at this time if any reduction were made in the farm location differentials in conjunction with the 7-cent reduction in the city plant Class I zone differential proposed herein. It is therefore appropriate that the present levels of farm location differentials continue to be applicable under the New England orders.

The proponent cooperative associations excepted to the findings and conclusions on this issue and requested that a decision on the issue be deferred pending a suggested study of the economic and legal aspects of farm location differentials by industry and governmental representatives. As indicated above, we believe there are adequate reasons on this record for continuing the farm location differentials at their present rates. An industry study of such differentials may be made, of course, at any time or could have been made at any time in the past in preparation for their review. The matter may be reviewed when it is shown that further consideration in hearing is appropriate. We are not warranted in deferring the decision until such a study has been made.

It would not be appropriate to increase the farm location differentials under the Massachusetts-Rhode Island and Connecticut orders, however, by part or all of the proposed reduction in the city plant Class I zone differential. Proponent of this proposal contended that under a reduced transportation differential such an increase in farm location differentials should be made to reflect in the returns to nearby producers the full value of nearby producer milk as compared to country plant milk.

It is probable that the attractiveness to handlers of nearby producer sources of milk will be increased under the circumstance of a reduced city plant Class I zone differential. As described under Issue No. 3, country receiving and transportation costs have decreased in recent years, indicating that the present zone differential for city plants is excessive. Reducing the zone differential merely provides for a proper relationship between the price to the handler for producer milk received at city plants as compared with the price to the handler for milk purchased from country plants. While such action may increase the marketability of nearby milk, the intrinsic value of the milk has not been increased. Accordingly, this proposal is denied.

The present farm location differential areas under the Boston, Springfield, Worcester, and Southeastern New England orders should be combined under the Massachusetts-Rhode Island order. With minor exception as described later, all territory which is within the present 46-cent differential area under any of the four orders should constitute the 46-cent differential area under the consolidated order. Similarly, all territory (also with minor exception as described later) which would not be within this proposed common 46-cent differential area but is now within the 23-cent differential area under any of the present four orders should constitute the 23-cent differential area under the consolidated order.

Producers now under the four orders to be merged would be suppliers of a single marketing area under the Massachusetts-Rhode Island order. Because only one marketing area will be involved, producers should receive the highest farm location differentials for which their farm locations would have made them eligible under any of the present four orders, regardless of the plant to which their milk is delivered under the merged order.

The consolidation of the respective farm location differential areas now provided under the four orders would

eliminate sometimes unexpected decreases in returns to individual producers. When a distributing plant becomes pooled in another market, the producers delivering milk to that plant become associated with the new market also. This has been a disturbing condition for certain producers who were eligible for the 46-cent differential before a plant shift but who became eligible only for the 23-cent differential, or for no differential at all, after the shift was made. Handlers experience difficulty at times in handling milk with maximum efficiency because of their reluctance to shift producers from one market to another when such producers would experience a reduction in returns. Cooperative associations also may be handicapped in shifting producers to plants which have need for additional supplies. It is appropriate, therefore, that the application of farm location differentials under the Massachusetts-Rhode Island order be as described.

It is not necessary to provide that a New England producer who is eligible for a farm location differential under the Connecticut order or the Massachusetts-Rhode Island order be eligible for the same differential when his milk is pooled under the other New England order. The consolidation of the four orders and the farm location differential areas provided thereunder will remove, for all practical purposes, the problem of change in differentials for producers who shift, or are shifted, from one to the other of these markets. This is so since it is likely that there will be relatively few instances of plant shifts with only two orders in New England and since virtually all producers shipping to the merged market but readily available to the Connecticut market would be in the 46-cent differential area under either order.

As indicated, the 46-cent and 23-cent differential areas under the Boston order are proposed to constitute a part of the areas in which farm location differentials would be applicable under the consolidated order. In contrast to the other four New England orders which now define farm location differential areas in terms of city and town bound-

aries or easily distinguishable highways or rivers, the differential areas under the Boston order are defined by "40-mile" and "30-mile" airline arcs which are measured from specified locations. To facilitate the administration of the orders, it is concluded that the peripheries of the two differential areas provided under the Massachusetts-Rhode Island order should be described in terms of city and town boundaries. The use under the consolidated order of long-established, well-known, and readily ascertainable political boundaries will provide a less burdensome procedure for determining a producer's eligibility to receive a farm location differential than does the use of airline arcs measured from a base point.

Under this proposed modification of a portion of the peripheries of the Boston order farm location differential areas, all cities and towns in Maine and New Hampshire which are wholly within the present 40-mile arc, as measured from Lawrence, Massachusetts, would be included in the 46-cent differential area under the consolidated order. In addition, the modification would extend the 46-cent differential area to the entire area of the following cities and towns which are now intersected by the 40-mile arc: the cities and towns of Barrington, Chichester, Deering, Francestown, Greenfield, Pembrooke, Pittsfield, Rochester, Rollinsford, Strafford, and Weare in New Hampshire.

The 23-cent differential area under the merged order would include those cities and towns in Maine and New Hampshire which are wholly within the presently defined 80-mile arc under the Boston order but which would not be included in the Massachusetts-Rhode Island 46-cent differential area. In addition the entire area of each of the towns of Kennebunkport and Lyman in Maine and Gilmanton, Middleton, Milton, and Surry in New Hampshire would be included in the 23-cent differential area under the merged order.

The cities and towns individually listed above are those areas which are intersected by the respective airline arcs

used in defining the differential areas under the Boston order and from which one or more producers recently have delivered milk to the Boston market from farms located inside the respective arcs. The remaining cities and towns which are intersected by the respective arcs are areas from which no milk has been delivered to the Boston market since January 1, 1962. Accordingly, it is appropriate that these areas not be included within the respective differential areas. Under this arrangement, only nine Boston producers known to have farms located in the 23-cent differential area at the time of the hearing would be shifted to the 46-cent differential area and the farm of one known Boston producer not located in any differential area would be shifted to the 23-cent differential area.

Exception was taken to the proposed continued use of certain highways in defining the peripheries of the farm location differential areas under the Connecticut order. Exceptor contended that inasmuch as it was proposed in the recommended decision that the peripheries of the farm location differential areas under the consolidated order be defined in terms of political boundaries similar procedure should be used in all cases under the Connecticut order.

No proposal of this nature was presented at the hearing which would provide a basis for this action. Moreover, the highways used to describe part of the area boundaries are easily ascertainable lines of delineation. This is in contrast to the more difficult determination of area peripheries on the basis of airline arcs as currently in use under the Boston order. The principal purpose of the proposed change in the manner of defining farm location differential areas under the Massachusetts-Rhode Island order is to establish for both producers and the market administrator boundaries which can be easily determined. In many instances well-defined highways also meet this requirement for the establishment of boundaries. We know of no problem in this connection under the Connecticut order.

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APPENDIX B

[Filed May 24, 1967]

Memorandum

The plaintiffs' motion for summary judgment is granted on the authority of *Blair. et al.* v. *Freeman,* U.S. App. D.C. , No. 19,801, decided November 18, 1966.

Counsel for plaintiffs will submit an appropriate order.

JOSEPH C. MCGARRAGHY
Judge

May 24, 1967

[Filed June 15, 1967]

Order Granting Motion for Summary Judgment and Judgment for Declaratory and Injunctive Relief

This cause came on for hearing on the Motion for Summary Judgment filed herein by the plaintiffs, and the Court having considered the Motion and Opposition thereto, the verified complaint, pleadings, affidavits, points and authorities, exhibits, and other papers filed herein, and having heard argument of counsel for each party and being fully advised in the premises in respect to the entire record, the orders entered herein, the pertinent portions of the administrative record, the arguments of the amicus curiae and former applicants for intervention, and all other considerations, the Court makes the following

FINDINGS OF FACT

1. The plaintiffs and their class are dairy farmers and milk producers as defined in the Agricultural Marketing Agreement Act of 1937, as amended, and the federal milk order regulating the handling of milk in the Massachusetts-Rhode Island milk marketing area, 7 C.F.R. 1001. They have brought this action for themselves, individually, and for the benefit of all other milk producers similarly situated who produce and sell their milk under the said milk

order, which was promulgated by the defendant effective October 1, 1964, and is still in effect at the present time. The plaintiffs seek a judgment that Section 1001.72 of said milk order, the nearby farm location differential provision thereof, is invalid and void. They also request a permanent injunction against the continued enforcement of said milk order provision by the defendant.

2. The Massachusetts-Rhode Island milk order promulgated by defendant contains the aforesaid nearby farm location differential provision, 7 C.F.R. 1001.72, which provides that milk producers whose farms are located in either of two designated areas, as determined by certain enumerated towns, cities, counties and States in each area, are entitled to receive an additional payment for their milk, over and above the uniform blended price received by all milk producers serving the market, of 46 cents or 23 cents per hundredweight, respectively, depending upon in which of the two "nearby" designated areas their farms are located.

3. The nearby farm location differential payments are deducted from the equalization pool proceeds belonging in equity to all milk producers serving the market, and such deduction reduces the uniform blended price which the plaintiffs and their class would otherwise receive for their milk, 29 Fed. Reg. 5590, 29 Fed. Reg. 11213, their farms being so located that they are not in either of the two designated nearby areas which are eligible for the said nearby farm location differential payments.

4. The plaintiffs and their class are required by the operation and provisions of the said milk order nearby differential section, 7 C.F.R. 1001.72, to sustain a reduction in the uniform blended price which they would otherwise receive, in the absence of said differential provision, of approximately $3,000,000.00 per year, the total differential payments under Section 1001.72 amounting to approximately $4,000,000.00 per year.

5. The plaintiffs and their class of ineligible milk producers constitute approximately 6,600 of the 8,800 milk producers serving the market, and there is no way that the said nearby differential payments may be recovered from the "nearby" milk producers by the plaintiffs and their class once such payments are made, in that the 8,800 milk producers are located in many different jurisdictions in various New England and other States and such attempts at recovery would involve a multiplicity of parties and actions.

6. This action has been brought by the plaintiffs as a class action, that is as an action for plaintiffs, individually, and for all other milk producers similarly situated who produce and market their milk under the said milk order. The defendant, through the promulgation of said milk order provision establishing the eligible and non-eligible class of milk producers for said nearby farm location differential payments, has acted on grounds generally applicable to the class, thereby making appropriate the relief requested with respect to plaintiffs' class of milk producer as a whole. The plaintiffs' class of non-eligible milk producers are so numerous that joinder of all members is impracticable. There are questions of law common to the class, and the claims of the plaintiffs as representative parties are typical of those of the class. The Court has found that the plaintiffs as representative parties will fairly and adequately protect the interests of their class of non-eligible milk producers, and it has entered an order herein authorizing the maintenance of this suit as a class action under Rule 23 (a) and (b) (2), FRCP. The Court has also found and entered an order herein that the defendant is adequately representing any interests of the eligible or "nearby" milk producers that would be adversely affected by the invalidation of the milk order provision, by virtue of the defendant's defense of the nearby farm location differential payments, and it has considered the arguments and defenses of the applicants for intervention as set forth

in their pleadings and those of the defendant, including the defendant's motion to hold these proceedings in abeyance. The Court finds that both the plaintiffs and the defendant have adequately represented the interests of the respective classes of ineligible and eligible milk producers, and this judgment includes in its application the said two classes of milk producers, those whose farms are so located as to make them either eligible or ineligible for the nearby farm location differential payments of the milk order.

7. On January 16, 1967, pursuant to the motion of the plaintiffs, this Court entered an order granting a preliminary injunction during the pendency of this action or until further order of the Court enjoining the defendant from paying over to the eligible class of milk producers the monies representing the contested nearby farm location differential payments of the said milk order and requiring that the defendant collect, place and retain the monthly sums that would otherwise be paid over under said order provision in an escrow account subject to the control of the Court. On March 17, 1967, the said preliminary injunction was modified by a consent order to allow the disbursement from said escrow account of those monies therein attributable to the marketings of milk of the nearby or eligible class of milk producers and for the future payment to them of the said amounts that would otherwise be escrowed except for such modification of the preliminary injunction. The defendant is required by the terms of such order to make monthly reports concerning the escrow deposits and to furnish the same to the Court and to the plaintiffs' attorney, but it has failed to do so since its report pertaining to the said nearby differential payments attributable to the marketing of milk during January, 1967. The monies in the said escrow account presently consist of those withheld from the ineligible or non-nearby milk producers by virtue of the aforesaid reduction in the uniform blended price which they would otherwise receive

for their milk except for the said nearby differential provision.

8. On March 21, 1967, this Court denied the motion of Frederick T. Zuber, et al., for leave to intervene herein as defendants, and the applicants' motion for summary reversal of said order of this Court was denied by the United States Court of Appeals for the District of Columbia Circuit on May 5, 1967, "without prejudice to such action as the appellants may be advised to take following final judgment in the District Court where so far as presently appears there will have been accorded to those appellants by such judgment such recognition of their claims as they may be entitled to receive;". The said Order of the Court of Appeals further stated that the denial of their motion did not constitute a bar to renewing the motion for the purpose of showing in what respect the defendant failed to adequately represent the appellants' interests in the District Court. The proceedings in the Court of Appeals in respect to the appellants' appeal of said Order denying intervention were suspended pending decision of this Court on the plaintiffs' motion for summary judgment, in respect to designation of the record to be printed and the filing of briefs, for a period of twenty days from the date of the ruling of this Court on said motion. Said Order of the Court of Appeals of May 24, 1967, suspending the proceedings in that Court as aforesaid was unopposed by the plaintiffs, who filed a formal consent herein to the filing of a brief amicus curiae by Frederick T. Zuber, et al., for the presentation of any defense or argument that they might desire to place before this Court and who furnished the said applicants with a designation of the page references of the administrative record relating to the nearby farm location differential. The said applicants did not avail themselves of the opportunity to file such a brief in this Court as proposed by the plaintiffs or file any other response thereto, although the same local law firm that represented the applicants Frederick T. Zuber, et al.,

did file such a brief as local counsel for the Commonwealth of Massachusetts with the consent of plaintiffs on the 15th day of May, 1967, the day prior to the hearing on the plaintiffs' motion for summary judgment.

9. On November 18, 1966, the United States Court of Appeals for the District of Columbia Circuit handed down a decision in the case of *Lorton Blair, et al.* v. *Orville Freeman, Secretary of Agriculture of the United States,* No. 19,801, ... U.S. App. D.C. ...., 370 F.2d 229, in which it held that the nearby farm location differential provision of the New York-New Jersey federal milk marketing order, 7 C.F.R. 1002.71(b) was unauthorized and void, and it ordered the reversal of the decision of the District Court, C. A. No. 498-65, and the granting of a judgment declaring the invalidity of said milk order provision and the issuance of a permanent injunction against its continued enforcement by the defendant. The time for petitioning the Supreme Court of the United States for the issuance of a writ of certiorari has expired in said case. There is no substantial difference between the operation of the nearby farm location differential provision of the New York-New Jersey milk order declared invalid and void in the case of *Blair* v. *Freeman,* supra, and that of the Massachusetts-Rhode Island milk order contested in this action. Both provide for the nearby differential payments from the equalization pool proceeds through reduction of the uniform blended price, and the said payments to the nearby or eligible milk producers reduce pro tanto the amount which the plaintiffs and their class would otherwise receive for their milk under the respective milk orders.

10. On the authority of *Blair* v. *Freeman,* supra, the Court finds that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, is invalid and void as being in excess of the statutory power of the defendant Secretary of Agri-

culture, in that the said differential is not one of the adjustments to the uniform blended price authorized under the Agricultural Marketing Agreement Act of 1937, as amended, and constitutes a diversion of that portion of the uniform blended price represented by said differential to which the plaintiffs and their class are entitled under the said Act. The said nearby differential provision does not constitute the adjustments authorized under either 608c (5)(b)(ii)(a) or (c) of the Act, nor is it authorized under 608c(7) of the Act as incidental, consistent and necessary in respect to the other terms and conditions of the Act. The said nearby differential payments to the eligible milk producers are determined on the basis of the location of their farms and are not authorized as production or market differentials under the Act. H.R. Rep. No. 1241, 74th Cong., 1st Sess. 10 (1935). Nor does eligibility for such nearby differential payments turn on the location at which delivery of the milk is made, but solely on the location of the farms in the areas designated in Section 1001.72 of the milk order.

As in *Blair,* the differential involves considerations involving the use of milk of the eligible "nearby" milk producers and the payments thereof are also geared to the use of fluid milk, thus violating the prohibitions of the Act concerning payment to all producers of a uniform price for their milk irrespective of use thereof. For these and the other reasons stated in *Blair,* the nearby farm location differential provision of the Massachusetts-Rhode Island milk order is invalid and void. The Court has fully considered the other claims and defenses of the defendant, the amicus curiae, and the applicants for intervention herein, including that claim of Frederick T. Zuber, et al., applicants for intervention, that invalidation of the nearby differential by this Court would deprive nearby milk producers of property without due process of law and concerning the alleged non-separability of the provisions of

the milk order, Section 1001.96, and the Court finds that the same do not constitute a basis for denial of the plaintiffs' motion and the relief requested in their complaint. Further, the Court has found that the plaintiffs and their class are sustaining irreparable injury by virtue of the nearby differential payments and that the issues presented are properly those for judicial determination.

Now, THEREFORE, the Court makes the following

CONCLUSIONS OF LAW

1. The plaintiffs and their class are entitled to the granting of the motion for summary judgment filed herein by them on the 24th day of February, 1967.

2. The plaintiffs and their class are entitled to the relief requested in their complaint, namely declaration of the invalidity of Section 1001.72 of the Massachusetts-Rhode Island milk order and a permanent injunction against its continued enforcement by the defendant, in order to preclude further irreparable injury to them, and they have no adequate remedy at law.

ORDER

WHEREFORE, it is by the Court this 15th day of June, 1967,

ORDERED, that the motion for summary judgment filed herein by the plaintiffs and their class be and the same hereby is granted, and it is further

ORDERED, ADJUDGED and DECREED, that the nearby farm location differential provision of the Massachusetts-Rhode Island milk order, 7 C.F.R. 1001.72, be and the same hereby is declared invalid and void, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Secretary of Agriculture, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, attorneys, servants and employees, and all persons in active concert or participation with them, be and they hereby are restrained and enjoined from enforcing the nearby farm location differential provision of the Massa-

chusetts-Rhode Island milk order, Section 7 C.F.R. 1001.72, at any time in the future under the same or any other name or designation, either directly or indirectly, and it is further

ORDERED, ADJUDGED and DECREED, that the defendant take all necessary action to effectuate the required termination of the operation of said milk order provision, and it is further

ORDERED, that the defendant, his Market Administrator for the Massachusetts-Rhode Island milk marketing area, their agents, employees, attorneys and servants, comply with the orders of this Court of the 16th day of January, 1967, and the 21st day of March, 1967, requiring that a separate report be filed with the Court and furnished to plaintiffs' counsel, Charles Patrick Ryan, 400 Prudential Building, Washington 5, D. C., concerning the information relating to deposits of the differential payments in the escrow fund established under the control of this Court, for those months for which such a report was not filed or furnished, to and including the report relating to the milk delivered during the month of April, 1967, the said reports to be filed and furnished on or before the 30th day of June, 1967, and it is further

ORDERED, that the defendant and his said Market Administrator retain the monies representing the nearby differential payments deposited in the said escrow fund pending further order of this Court to be entered concerning distribution of the said fund after compliance with the filing and furnishing of the said monthly reports as aforesaid and after a ruling by the United States Court of Appeals for the District of Columbia Circuit in respect to the appeal of Frederick T. Zuber, et al., No. 20,931, of the Order of this Court denying them intervention in this action, dated March 21, 1967, said appeal being presently pending in the Court of Appeals.

JOSEPH C. MCGARRAGHY
District Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,141

FREDERICK T. ZUBER, ET AL., *Appellants,*

v.

RUSSELL ALLEN, ET AL., *Appellees.*

No. 21,308

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE, *Appellant,*

v.

RUSSELL ALLEN, ET AL., *Appellees.*

Appeals from the United States District Court
for the District of Columbia

Decided September 23, 1968

Mr. Lawrence D. Hollman, with whom *Mr. Carlyle C. Ring, Jr.,* was on the brief, for appellants in No. 21,141.

Mr. Walter H. Fleischer, Attorney, Department of Justice, with whom *Assistant Attorney General Edwin L. Weisl, Jr., Messrs. David G. Bress,* United States Attorney, and *Alan S. Rosenthal,* Attorney, Department of Justice, were on the brief, for appellant in No. 21,308. *Mr. Frank Q. Nebeker,* Assistant United States Attorney, also entered an appearance for appellant in No. 21,308.

Mr. Charles Patrick Ryan for appellees.

Mr. Edward J. Ryan filed a brief on behalf of the State of Vermont, as *amicus curiae* in No. 21,141. *Mr. Charles P. Ryan* also entered an appearance for the State of Vermont as *amicus curiae* in No. 21,141.

Mr. Franklin M. Schultz filed a brief on behalf of the State of Connecticut, as *amicus curiae* in No. 21,141.

Mr. James R. Worsley, Jr., filed a brief on behalf of the Commonwealth of Massachusetts as *amicus curiae* in No. 21,141.

Before BURGER, WRIGHT and MCGOWAN, *Circuit Judges.*

MCGOWAN, *Circuit Judge:* These are appeals by the Secretary of Agriculture and a group of dairy farmers from a judgment of the District Court declaring illegal and enjoining further enforcement of the "farm location differential" provision[1] in the 1964 federal milk marketing order for the Massachusetts-Rhode Island area. We recently invalidated a like provision of the 1957 New York-New Jersey milk marketing order on grounds of its incompatibility with the Agricultural Marketing Agreement Act of 1937.[2] *Blair* v. *Freeman,* 125 U.S. App. D.C. 207, 370 F. 2d 229 (1966). Since we find that the farm location differential of the Massachusetts-Rhode Island order is no less irreconcilable with the statute, we affirm the judgment and order of the District Court.

I

The rationale and mechanics of federal regulation of the marketing of milk and other dairy products have been fully described in *Blair* and elsewhere.[3] Briefly, the marketing order is designed to eliminate the destructive competition which grew out of the surplus conditions which characterized the milk industry before federal regulation. The de-

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[1] 7 C.F.R. § 1001.72 (1968).

[2] 7 U.S.C. §§ 601-24 (1964), *as amended,* (Supp. I, 1965).

[3] *See* Lehigh Valley Cooperative Farmers, Inc. v. United States, 370 U.S. 76 (1962); H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588 (1939); United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939); Grant v. Benson, 97 U.S. App. D.C. 191, 229 F. 2d 765 (1955), *cert. denied,* 350 U.S. 1015 (1956); Green Valley Creamery, Inc. v. United States, 108 F. 2d 342 (1st Cir. 1939).

vice chosen to this end is a uniform, "blended" price to be paid by handlers to each producer in the marketing area, regardless of whether his milk is ultimately disposed of by the handler at the high Class I price for fluid use, or at the lower Class II price paid for milk to be used in the manufacture of various milk products (butter, cheese, ice cream, and so on). An equalization pool, called the "producer settlement fund," is administered by the agent of the Secretary of Agriculture to maintain the blended price; and handlers make payments to or withdrawals from the pool in the amounts by which the use value of milk which they handle exceeds or is less than the blended price.

The Act specifies several limited exceptions which the marketing order may make to the requirement that each producer receive a uniform price. Thus, Section 8(c)(5) permits the inclusion in the order of provisions

> (B) Providing:
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> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made . . . .

Purportedly acting pursuant to the authority of this section, the Secretary included in the 1964 Massachusetts-Rhode Island order several differentials which operate to vary the payments to producers. These are (1) a "butterfat differential," based on the quality of the farmer's milk;[4] (2) "zone differentials," which vary inversely with

[4] 7 C.F.R. § 1001.71 (1968).

the distance from Boston of the handler's plant to which the producer delivers his milk;[5] and (3) the "farm location differentials," which are paid to producers whose farms are located near the principal consumption centers. This last form of differential, commonly known as the "nearby differential," is forty-six cents per hundredweight for farmers located in certain designated towns and twenty-three cents per hundredweight for those in more distant towns.

The plaintiffs, 168 dairy farmers who are ineligible for any farm location differential, brought this action against the Secretary of Agriculture seeking a halt to these allegedly discriminatory and unauthorized payments.[6] They are aggrieved in that the differential is paid out of the equalization pool, rather than the handler's own pocket, and consequently reduces the blended price received by all producers. The District Court granted the plaintiffs' motion for a preliminary injunction which provided for the escrowing of the challenged differential, and thereafter, relying wholly on our decision in *Blair* v. *Freeman,* granted their motion for summary judgment. The escrowing, though later amended to release amounts attributable to nearby producers, was continued pending a decision by this court. When it appeared that the Secretary might not appeal,[7] we granted Zuber and seven other nearby farmers, whose motion to intervene had been denied by the District Court, leave to intervene for the sole purpose of protecting their

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[5] 7 C.F.R. § 1001.62 (1968).

[6] The suit was filed a few weeks after our decision in *Blair.* In that case we made clear the wholly prospective nature of our decision, stating that it was "not intended to afford any basis for recovery by appellants or their class based on past payments." 370 F. 2d at 240. We reaffirm that approach here.

[7] This prospect was represented as residing in the fact that the Government had decided not to seek review in the Supreme Court of our decision in *Blair.*

rights by appeal. The Secretary subsequently perfected an appeal, which we heard together with that of Zuber.

Appellants have pressed upon us several distinct positions. They argue, first, that the farm location differential is valid because it is founded not upon the factor of fluid milk utilization condemned in *Blair* but on other considerations which are authorized by the Act. Secondly, they contend that, whatever might be the fate of another farm location differential under Section 8(c)(5), this particular provision was explicitly ratified and validated both by Congress in 1937 and by the United States Court of Appeals for the First Circuit in 1939. Thirdly, appellants assert that, if the legality of the provision is not clear, neither is its illegality; and that the case should be remanded to the Secretary to afford him an opportunity to elucidate the legal and factual premises of the nearby differential, or to determine whether, if the differential must fall, the marketing order should be continued, with or without other changes. Finally, it is argued that, even if the District Court is affirmed, considerations of equity dictate that its judgment be wholly prospective from the date of our decision, and that the escrowed monies should be distributed to the nearby farmers who have relied on the farm location differential for so many years. We deal with these points in order.

II

As we held in *Blair:*

> [T]he Act forbids consideration of the use to which the milk of a particular producer or class of producers is put, historically or potentially, in adjusting the uniform minimum price to be paid to such producers.[8]

In adopting the New York-New Jersey order in 1957, the Secretary was explicit in his reliance upon this outlawed

[8] 370 F. 2d at 237.

consideration.[9] He is certainly less so in his justification of the 1964 Massachusetts-Rhode Island order:

> Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed.
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> . . . .
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> . . . [W]e believe there are adequate reasons on this record for continuing the farm location differentials at their present rates.[10]

But we do not think it can be said, as appellants now do, that this explanation does not reflect any reliance whatsoever upon the prohibited factor of fluid use patterns. To say, of the order under review, that milk produced in locations close to principal consumption centers has enjoyed "customarily somewhat higher values" above transportation costs, and that the differential is provided to reflect

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[9] The differential had been designed, he said:

> to give the nearby producer a somewhat greater share of the high-priced [fluid] milk than he would obtain through market-wide pooling without such a differential . . . .

and

> to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk . . . .

22 Fed. Reg. 4213-14 (1957).

[10] 29 Fed. Reg. 11205, 11213-14 (1964).

"these historical price relationships by location," may be only a less direct way of saying, as in the case of the New York-New Jersey order, that the differential was designed "to reflect the fact that under competitive conditions" nearby producers got a higher price because they had a bigger share of the fluid use market. If examination is made of the "record" to which the Secretary adverted in his 1964 statement—the various New England marketing orders which preceded the 1964 order and the administrative records on which they were based—it is revealed inexorably that, as in the case of New York-New Jersey, those "historical price relationships by location" were the fluid use advantages which the Act expressly condemns.

The 1964 order consolidated the former federal orders regulating the handling of milk in four separate marketing areas: Greater Boston, Worcester, Springfield, and Southeastern New England. The oldest and most prominent of these was the Greater Boston marketing order. Under federal "licenses" pursuant to the 1933 Agricultural Adjustment Act,[11] milk in the Boston area was marketed, as it had sometimes been by cooperative associations before federal regulation, through base-rating plans. In 1934 the market administrator

> allotted preferential bases to nearby producers to give effect to the historically higher prices they had received in the market. A study was made of the eight years 1926 to 1934 to obtain the proper differential between nearby and distant producers' returns from the sale of milk. It was determined that all producers where milk was *delivered directly to plants located within 35 miles* of the State House in Boston should have bases equal to 85 percent. . . . [as compared with 61 percent for all other producers].[12]

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[11] 48 Stat. 31 (1933).

[12] Barnhardt, Federal Regulation of Milk Handling in Boston 95 (1947) (emphasis added).

Because many nearby producers refused to comply with the license, and "as a concession to win the cooperation of the Massachusetts Milk Control Board in enforcing, or trying to enforce, the terms of the federal license,"[13] in 1935 cooperative associations agreed to allow producers whose farms were within forty miles of the State House bases of 100 per cent. This forty mile radius later became official under Greater Boston Order No. 4.

This Order No. 4, promulgated in 1936 after the 1935 amendments to the Act, retained the base-rating system but abandoned the preferential bases for nearby producers. In their place it was provided that producers whose farms were located within forty miles of the State House and *who delivered to plants within the same area* be paid the full Class I price for all milk not in excess of their bases. Other farmers received only the blended price for their bases. Distant producers could, however, receive an additional twenty-one cents by delivering to a handler within the forty mile radius—a "country station" differential which (unlike the situation today) was not also available to the nearby producer. The latter differential was found by the Secretary to be a "reasonable allowance for the extra handling costs incurred by handlers operating country station plants." As to the former, the Secretary stated that

> the payment of class I prices for the bases of producers whose farms are within forty miles of Boston is a proper recognition of the economic position of such producers, *due to the greater availability of their milk for class I use.* . . . (emphasis added)

The order did not expand upon this ground for the preferred treatment of nearby producers. It is a finding which appears to be derived directly from the testimony at the hearing of the representative of the U. S. Department of

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[13] *Id.* at 231.

Agriculture. In explaining the proposed order, he said this about the differential in question:

> Now, I presume that you know some reason for that special provision located in that zone. I am not sure that I made such a statement of that as we here in this brief, and so I think I might make it at this time, and then perhaps there will be further questions.
>
> With respect to this particular provision, it should be noted that a producer whose farm is located near the market is in a position to supply Class I milk for use at all times, at less cost and distances, and if necessary he can, after each twice-a-day milking, put his milk on his own truck and deliver it to a handler or to consumers. Forty miles, however, is approximately a limit of the use of such facility in handling milk.

Evenness of production was certainly not assigned as the reason, presumably because this quality was already compensated by base-rating itself. Higher local production costs had been mentioned at the hearings in support of the special treatment, but this ground was evidently rejected by the Secretary. Since nearby producers were not also to receive the "country station" differential, their preference must have been attributable in large part to transportation and handling advantages. This surmise is supported not only by the Secretary's use of the word "availability" but also by the following argument in the Department of Agriculture's Economic Brief in 1936:

> It should be noted that a producer whose farm is located near the market is in a position to supply milk for Class I use to the market more easily at all times than those at a greater distance. Much less time is required for the movement of the milk and a greater variety of transportation facilities are available to such a producer. If necessary, he can, after each twice-a-day milking and within two hours deliver it

> to a handler or even to consumers. . . . Moreover, those producers whose farms are located beyond the forty-mile line who so desire may deliver their milk to handlers within the forty-mile line, in which event they are to be paid the blended price, plus [21] cents.
> . . . .

The savings in transportation and handling expenses were not, of course, the whole story. The Agriculture Department's testimony and brief identify another element which was also heavily emphasized at the hearings, namely, the nearby producers' opportunities for direct access to the consumer. This fact was cited at the hearings as the explanation for traditionally higher prices to nearby producers ("he can sell it to the dealer or become a dealer himself, and go direct to the [consumer], and you cannot stop him") and as a potential "menace to the enforcement of the agreement."

In sum, the Secretary did not indicate that he had accorded nearby producers a preferred position because their ever-available milk supply was itself more valuable to the handlers. His action, rather, was based on the nearby producers' "economic position," a position which had enabled them to command higher prices from handlers before regulation and which enabled them to coerce this concession in the marketing order. The reason for this "economic position" was, as the Secretary recognized, "availability *for Class I* use." We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair*.

After passage of the 1937 Agricultural Marketing Agreement Act, Order No. 4 was amended to do away with base-rating. The nearby producer's preferred status was preserved, however, by the payment of farm and delivery location differentials. For the first time, the condition of nearby delivery was dropped from the farm location differential, and the farm location and delivery location dif-

ferentials were paid cumulatively. The Secretary found only:

> [t]hat in view of changes in economic conditions since the date of the original findings, the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for milk so delivered, *without the use of a base-rating plan, but with the inclusion of special location differentials,* is a fair and reasonable method of distributing to producers the proceeds of sales of milk to handlers.[14]

The farm location differential was designed to reproduce as closely as possible the nearby farmer's preferred position under base-rating. Thus, the differential was (and still is) payable only to the extent that it did not increase the producer's payment above the Class I price.[15] As the

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[14] 2 Fed. Reg. 1331 (1937) (emphasis supplied).

[15] This feature of the order is similar to a provision of the New York-New Jersey order which we found in *Blair* to indicate the connection between the differential and the prohibited consideration of fluid milk use. We there said:

> . . . that payments vary (inversely) with the extent of fluid milk utilization [in the entire market]. The differential is sensitively attuned to the supposed special place of the nearby producer in the fluid milk market, and is taken away when fluid milk utilization is so high marketwide that he merits no premium based on that special place.

370 F. 2d at 237-38. A like interaction between the amount of the differential and marketwide fluid milk utilization is achieved by the provision of the Massachusetts-Rhode Island order that if "the addition of 46 cents gives a result greater than the Class I price . . . there shall be added [only] a rate which will produce that price." Since the blend price itself rises with increased fluid utilization, the amount of the differential necessary to give the nearby farmer the Class I (fluid) price varies inversely with marketwide fluid milk use.

Agriculture Department argued in its 1937 Economic Brief:

> It is thought that the proposed plan, which gives consideration to those producers located nearby the market who are predominantly even and who as a group have very uniform deliveries, and which returns a price higher than the average to the other even producers, accomplishes the purpose for which the rating plan in Order No. 4 was intended.

Evenness of production, which was awarded on an individual basis under base-rating, was an alleged advantage of nearby farmers frequently cited by proponents of the differential during the hearings as explaining their historically higher prices. The Market Administrator's explanation is typical:

> The idea is, without regulation over a period of years producers whose farms are near the market, due to the fact that their milk is accessible to small dealers, and their milk is rather even throughout the year, have been able to obtain a price greater than the country station charges. So that, if we set up a plan which did not give them the same advantage which they would have without regulation it would be unfair to them. . . . It is the desire of the Administration to maintain the relative positions and to set that figure at a point which will do that.

This assertion about seasonality was somewhat undermined by the Department's admission that only two-thirds of the nearby producers could be classified as even, and that "even producers were scattered throughout the milkshed so that, for the most part, their evenness was completely offset by the irregularity of their neighbors." The principal relevance of evenness was not that it constituted an element of value in the sense of dependability to the handler, but that nearby producers, who as a group con-

tributed less to the surplus in the market, should not share the burden of that surplus by receiving only the blended price. This resort to seasonability, then, was not so much in explanation of historically higher prices but rather in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.*, for fluid use.[16]

Aside from references to evenness of production and the unfairness to the nearby farmer of disturbing his traditionally preferred market position, the evidence revolved mostly around what would happen if nearby farmers were not favored. The New England Milk Producers Association swore they would "oppose the license with every means in their power," and the witness referred to in footnote 16 made the pregnant observation that "there is always a row in the market unless [the nearby producers] are compensated in some way." One source of their power was also recognized: "We are all within retailing distance of the market and we are potential producer-dealers." This potentiality also underlay the observations in the Department's brief and elsewhere that "their milk is accessible to small dealers." This reference to availability was limited to small dealers as it had not been in the Secretary's finding in the 1936 Order, presumably because only large handlers could afford to bring in their milk from distant farms. That nearby farmers had a

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[16] This is evident from the 1937 testimony of the president of the Nearby Producers Association, asking for a nearby differential of at least one cent per quart over the blended price:

> Now, we feel that to be protected in our special place in the market requires two things. We must be protected against seasonal surplus. Our production is even and has always been regulated closely to the requirements of our distributors. Some of them asked distributors, will ask for more or less milk as they want it. [sic] In the second place, we must have somewhere near our differential—our consumer differential over the 200-mile zone, and get that much . . . .

captive market, however, does not alone explain the higher price, without the additional fact that the farmers or handlers could dispose of the milk at Class I prices. Economist Ellsworth Bell's brief to the Secretary concisely described this economic advantage:

> Being adjacent to markets the [nearby] dairymen command a natural sales advantage whereby it is taken first at the fluid price. . . . [Historical price difference] exists due to peculiar advantages existing for disposal and sale of milk at the higher market price.

In 1949 the Secretary first promulgated orders for the Springfield and Worcester markets, both of which contained nearby farm location differentials. Those in favor of the differentials had given testimony similar to that which preceded the Boston orders, and had argued for uniformity of treatment with the Boston market. In approving the differentials, the Secretary adverted to "the customary market practice of paying somewhat higher prices to producers located near the sales area." These historically higher prices were explained as follows:

> This difference cannot be attributed to transportation cost alone. The many opportunities for dairymen to market their own milk directly influence the price which they demand for their product.[17]

Those direct marketing opportunities were, of course, for fluid use at Class I prices.

In 1951 the Secretary held hearings on a proposal to eliminate the nearby differential in the Boston order. Opponents of the differential argued that it constituted a trade barrier; that evenness of production, if compensable at all, should be recognized on an individual basis; that the

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[17] 14 Fed. Reg. 7085, 7089 (1949); 14 Fed. Reg. 7097, 7102 (1949).

validity of the differential should be reexamined in the light of contemporary economic conditions; and that if nearby milk has any extra intrinsic value it should be paid for by the handlers rather than by the pool. Proponents of the differential brought out all the old arguments, with somewhat greater emphasis this time on the disruptive market effects of eliminating the differential, and on the unfairness to nearby farmers for whom the nearby differential had become capitalized into greater land values. A major pillar of their argument was the unabashed assertion that in terms of "historical price relationships . . . producers located near the market were able to sell a larger proportion of their milk at Class I." The representative of the Massachusetts Milk Control Board, for example, testified that the differential was not discriminatory but rather had been

> adopted by way of partial compensation to nearby producers for the losses which they suffered when the equalization provisions deprived them of those natural advantages which prior to federal regulation always enabled them to sell at [sic] a relatively higher percentage of their production of Class I milk.

The Secretary concluded that "no change should be made at this time" because the opponents had "presented no material facts different from those considered in establishing specified location differentials as a part of the order provisions." [18]

In the 1958 southeastern New England order, one of those now consolidated into the 1964 Massachusetts-Rhode Island order, the Secretary for the first time gave a detailed economic justification for the nearby differential, which he described as "identical with that employed in adjacent Federal order markets," a characterization which

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[18] 16 Fed. Reg. 9250, 9255 (1951).

includes the New York-New Jersey order invalidated by us in *Blair:*

> Historically, dairy farmers in the States of Massachusetts, Rhode Island, and Connecticut, because of their location with reference to the large population concentrations of New England have disposed of a substantially larger percentage of their production for fluid uses than have dairy farmers in the upcountry area. Hence nearby producers have been able to realize a price higher in relation to more distant producers than can be accounted for by the advantage in the cost of transportation to market. Under the marketwide pooling system herein proposed and without some adjustment mechanism the nearby producer, notwithstanding, would be paid on the basis of the average utilization of all milk on the milkshed rather than according to the utilization of his milk. Under a regulated market, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and has assurance that his milk will not be displaced by cheap, unregulated milk from more distant sources. The distant producer also benefits from an established Class I price, and by the fact that he gains a larger share of the fluid market than is likely without marketwide equalization.
>
> The use of a nearby differential will return to nearby producers a somewhat greater share of the Class I price than they would otherwise obtain through marketwide pooling. Moreover such a differential will tend to provide returns to both nearby and upcountry producers more nearly in line with their prospective returns without marketwide equalization.[19]

This rationale—which is clearly reflected in the 1964 order's language about "historical price relationships by

[19] 23 Fed. Reg. 8238 (1958).

location''—is indistinguishable from that advanced the year before in support of the 1957 New York-New Jersey order condemned by this court in *Blair* v. *Freeman*.[20]

The testimony at the hearings preceding the 1964 order served mainly to reinforce the Secretary's reliance on historical fluid use patterns as the primary justification for the nearby differential. Most of the witnesses in favor of retaining the differential either ignored, or rejected as irrelevant, the question of whether it had ever been authorized under the Act. Their testimony dwelt upon the absence of adverse economic effects of the differential, and the dire consequences which would flow from its elimination. When their attention was directed to the issue of the differential's original justification, some reiterated the testimony of 1937 to the effect that the differentials recognized the evenness of production of nearby milk and its accessibility to small dealers; that the nearby farmers enjoyed a favorable bargaining position because of their ability to become producer-dealers; and that the differential was a necessary compromise to win the support of the nearby farmers and Massachusetts Milk Control Board for the federal order.

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[20] The following year an identical provision was incorporated in the Connecticut order. It was proposed that this order be consolidated in the 1964 Massachusetts-Rhode Island order. It was not, but there is no indication that the Secretary viewed the nearby differential in Connecticut as in any way different from those under other Federal marketing orders:

> The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated markets.

24 Fed. Reg. 1049, 1063 (1959).

Almost to a man, however, the witnesses at the hearing testified—and no one denied—that the principal reason for the differential was to preserve for nearby producers their traditionally high percentage of the fluid use market. One witness even argued as follows for an increase in the nearby differential:

> We don't feel that these market pools were set up to make it possible for distant milk to take the Class I sales that rightfully belong to nearby farmers away from them. Again I think you have to consider the use value of the milk in determining the prices to the producers.

And a committee report specially prepared for the Department of Agriculture in 1962 was read into the record. While nearby milk was claimed to have various advantages, the report concluded that:

> the major purpose of nearby differentials apparently has been to compensate nearby producers for sharing market Class I sales with more distant producers in a marketwide pool.

In view of the concurrence of all concerned—including on occasion the Secretary himself—that the differential was a recognition of historical use values, we find it impossible to conclude that the Secretary did not rely on this illegal consideration in approving the 1964 order as well as all of its predecessors. Although in patent conflict with the blended price regulatory scheme propounded by Congress, it was apparently thought that the resulting distortion was a price necessary to be paid in order to get sufficient agreement to support a marketing order, and that it was better to pay that price than to have no order at all.

III

Section 4 of the 1937 Agricultural Adjustment Act provided:

> Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any

> regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.[21]

Appellants argue that, since nearby differentials appeared in the Greater Boston order before 1937, Section 4 immunizes the farm location differential from invalidation under another section of the Act.[22] We find this contention unpersuasive for several reasons.

First, it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937. There were differentials based on *delivery* location, and for a time farm location was one condition along with delivery location, but none seems to have been based on farm location alone. Moreover, the differential was never one payable over and

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[21] 50 Stat. 249 (1937).

[22] Appellants argue alternatively (1) that nearby differentials, even if inconsistent with Section 8(c)(5), were legalized by Section 4; or (2) that Section 4 constituted a legislative determination that every feature of extant federal licenses or orders before 1937 fell under one or more of the enabling provisions of the Act—in particular, that the nearby differential was a market or location differential within Section 8(c)(5). In support of this latter construction, appellants point to language in the Committee Reports underlying the 1935 amendments to the effect that "these terms [of Section 8(c)(5)] follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act [of 1933] and the provisions of licenses issued pursuant to the present [Act] . . . ." H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

above the transportation differential available to distant producers who delivered to a nearby zone.[23]

Second, Section 4 itself ratifies only those provisions and acts which were "done under the Agricultural Adjustment Act." This qualification negates any inference that Congress intended to sanction orders which were illegal under other sections of the Act. And this construction is consistent with what was clearly the sole legislative purpose underlying Section 4, namely, to prevent technical abatements which arguably might result from reenactment of the 1933 Act. In *United States* v. *Butler*, 297 U.S. 1 (1936), the Supreme Court had invalidated certain of the production control provisions of the 1933 Act; and several lower courts, construing these provisions as not severable, thought that the marketing agreement and order sections must also fall. Section 1 of the 1937 Act specifically reenacted the latter provisions of the Act in order to avoid that result.[24] Congress feared, however, that such reenactment might itself be construed as suggesting that, pending its accomplishment, the Act, and all actions taken by the Secretary under its aegis, had been illegal. Hence Section 4 of the 1937 Act.[25]

Appellants further assert that the legality of the farm location differential was established in 1939 by the United States Court of Appeals for the First Circuit in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (1st

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[23] See the descriptions of the licenses and orders, pp. 36a-38a, 39a-40a *supra*.

[24] 50 Stat. 246 (1937).

[25] The House Report stated:

> Section 4 . . . negatives any implication that [the bill's] effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action.

H.R. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

Cir. 1939). That case began as an action by the United States and the Secretary of Agriculture seeking a marketing injunction requiring the defendants, a group of milk *handlers*, to comply with Order No. 4 regulating milk marketing in the greater Boston area. One of the defenses was that the farm location differential was not authorized by Section 8(c)(5). After holding that *handlers* had no standing to raise this defense, the court volunteered the view that the differential could be justified under the Act either as a delivery location differential or a "market differential customarily applied." [26]

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[26] The court's rationale was as follows:

> There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8(c)(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

108 F. 2d at 346.

We took note of the *Green Valley* opinion in *Blair*, where it was also pressed upon us as dispositive; and at that time we expressed our disagreement with the First Circuit's analysis.[27] In any event, the opinion in that case could not control the outcome here. In the first place, only one of the orders which was consolidated into the Massachusetts-Rhode Island order in 1964 was under attack in *Green Valley*. Moreover, the defendants in that case were all handlers, and there was no representative of the class of non-nearby producers before the court. Indeed, as we said in *Blair*, the approval of the differential was a *dictum*, since "the court's holding was that the handlers lacked standing to challenge the disposition of the producer settlement fund."[28] We must conclude, therefore, that neither Congress nor the courts have validated the farm location differential of the Massachusetts-Rhode Island order.

IV

Appellants insist that, even if the Secretary had in the past relied upon historical fluid use patterns, there are other legitimate legal and factual grounds for the farm location differential. Therefore, they urge, the court should, before striking the provision from the order, in effect remand the case to the Secretary for an opportunity to offer a more explicit justification for the differential. We are not impressed with this suggestion since we do not think that a court should, in the face of what it finds to be a clear and continuingly burdensome statutory violation, albeit one of long standing, defer a declaration of its illegality. We are especially not disposed to do so where there appears to be no serious possibility of finding warrant in the statute for a preference based solely on farm location.

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[27] 370 F. 2d at 238.

[28] *Id.* at 238, n. 34.

We need not speculate as to what the Secretary would do upon such a remand, for he has already, since our decision in *Blair* and the judgment of the District Court in this case, issued a recommended decision on the farm location differential in the Massachusetts-Rhode Island order. He there concluded after further hearings on the subject that the nearby differential "should be continued." He noted that nearby farmers had received higher prices "prior to the advent of federal regulation," that this advantage had been preserved in the base-rating plans of the federal licenses and 1936 Boston order, and that it had been carried over into the nearby differential of the 1937 order. The Secretary quoted from the 1937 record to the effect that the historically higher price was:

> due to the fact that their production is relatively even, and that their milk is accessible to small dealers. . . . If we should take away from these producers a differential that they have been able to get without Government regulation, they would have a legitimate objection that we are placing them at a comparative disadvantage. . . .[29]

The fact of historically higher prices is, of course, not alone sufficient. The reason for that difference must not, under the Act, have been related to sales advantages for fluid use. To avoid this pitfall, the Secretary assigned two other explanations for the high prices: availability and evenness of production. The former is not a legitimate factor. To the extent that it reflects the nearby producers' ability to become distributors directly to the consumer, it is no more than an aspect of the high fluid utilization advantage. To the extent that availability means de-

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[29] 32 Fed. Reg. 9902, 9919 (1967).

pendability and ease of access, it is, as we held in *Blair*,[30] and as the Secretary himself recognized in the New York-New Jersey order, "related to the extra value of such milk to the handler who buys it rather than to producers generally and [is], therefore, . . . payable by handlers rather than out of the pool."[31] Nor would evenness of production appear to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed. Moreover, as the Secretary stated in his New York-New Jersey decision,[32] uniform supply should be compensated on an individual basis. The Act makes provision for base-rating,[33] and it appears to be the only sanctioned method by which to stimulate and compensate even production by individual farmers.

None of the differentials permitted by the Act contemplate in terms preferential treatment on the basis of farm location.[34] A dual legal justification for the nearby

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[30] If this history has any current significance, if the milk has greater "value" to the handler for reasons other than quality and location of delivery, it may be a reason for the producer to receive out of the handler's own pocket a premium above the minimum price, but this would not be a justification permitted by the law for a diversion from [distant farmers] of their equal share of the blended uniform minimum price adjusted only for the statutory differentials.

370 F. 2d at 238-39.

[31] 22 Fed. Reg. 4194, 4213 (1957).

[32] *Id.*

[33] 7 U.S.C. § 608c(5)(B) (Supp. 1967).

[34] While the Secretary relies only on the provisions for market and location differentials, the other appellants have attempted to justify the nearby differential as a "volume" or "production" differential. The Committee Reports, however, show those exceptions to be clearly inapt. H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 9-10 (1935).

differential, was, however, offered in the 1967 recommended decision:

> Clearly . . . these greater returns . . . were, in the language of the statute "market differentials customarily applied by the handlers." . . . Inasmuch as these greater returns for milk were directly related to geographical source, it was considered that these differentials were also adjustments based on "location" . . . within the meaning and context of [the Act].[35]

But the only "location" differential permitted by the Act is one for "the location at which delivery" of the milk is made to the handler. Plainly, this exception was designed to recognize differences in transportation costs only, and does not encompass a preference based solely on farm location.[36]

Nor is farm location comprehended within the provision for "market . . . differentials customarily applied by the handlers." The Committee Reports in respect of the 1935 Act are explicit that "the market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant."[37] This adjustment, of which the "country

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[35] 32 Fed. Reg. 9202, 9919 (1967).

[36] It may be that in authorizing a location differential in 1935, Congress intended to preserve the preferences enjoyed by nearby farmers under pre-1935 federal licenses and under voluntary agreements before any federal regulation. Those preferences, it appears, were phrased in terms of location of *delivery* (or delivery plus farm location), and it was generally true at that time, as the First Circuit noted in *Green Valley* (see n. 26 *supra*), that delivery and farm locations coincided fairly close. It is probably safe to guess that not until bulk tank trucking thereafter made it economically feasible for distant farmers to deliver in the city did the nearby farmers, for self-protection, insist that the nearby differential be based solely on farm location.

[37] H.R. Rep. No. 1241, S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

station" differential of the 1936 greater Boston order was an example,[38] recognized the savings in handling costs when milk in fluid form is delivered to the city rather than first to a country plant. Provision is now made for this differential in the Massachusetts-Rhode Island order as a fixed portion of the zone differential.[39] As we held in *Blair*,

> it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk. The "market differential" rationale is plainly not a tenable basis for thenearby differential.[40]

On August 2, 1968, the United States District Court for the Northern District of New York elected to treat a nearby differential of the kind here in issue as a "market differential." *Cranston* v. *Freeman*, —— F.Supp. ——. It recognized that the result it reached was directly in conflict with our decision in *Blair*, but it went on to say that while it "concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in [that Court's] conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market." In other words, although Congress authorized a price pooling arrangement in order to eliminate revenue disparities among producers due to varying access to the fluid milk market, those who enjoyed that advantage be-

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[38] See p. 36a-37a *supra*.

[39] The purpose of establishing zone differentials is to achieve a high degree of uniformity in prices to all handlers f.o.b. the market for milk which is received from producers at plants located at various distances from the principal consumption area. To achieve this purpose, the zone differentials must closely reflect costs generally incurred in receiving milk at country plants and moving such milk to city plants.

29 Fed. Reg. 11205, 11210 (1964).

[40] 370 F. 2d at 238.

fore pooling must continue to have it because a larger percentage of their production customarily goes into fluid milk use. This is, of course, precisely what the Secretary gave as his primary reason for including the nearby differential in the Connecticut marketing order involved in *Cranston:*

> Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price.
>
> . . . .
>
> Milk received from the nearby area has long represented the major part of the total Connecticut supply. *The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes.* Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated market. *The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under marketwide pooling.* (emphasis added) 24 Fed. Reg. 1049, 1063 (1959).

The *Cranston* court does not, therefore, sustain the nearby differential on some reason other than that relied upon by the Secretary in propounding it. It, rather, embraces fully the Secretary's persistent assumption that Congress did not really mean what it said about end-use

not being allowable as a factor in fixing the amount received for milk by the producer.[40.1] The *Cranston* court's acceptance of the "market differential" rationale thus flies in the face of the congressional purpose explicit in the statute, as well as the flat language of the Senate and House Committee Reports defining "market differential." See *supra* p. 54a-55a.

Even if the farm location differentials cannot be saved, appellants' argument continues, the case should be remanded to the Secretary so that he can determine whether other amendments are necessary and whether the order, without a nearby differential, effectuates the declared policy of the Act.[41] Appellants rely in this regard upon

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[40.1] The *Cranston* court purports to find some comfort in the 1939 decisions of the Supreme Court in *Hood* and *Rock Royal*, note 3 *supra*. As to the former, however, *Cranston* concedes that the Supreme Court "omitted any specific discussion of the farm location differentials" which had been challenged in the District Court—an omission of which Judge Magruder said in *Green Valley:*

> These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration here.

108 F. 2d 342, 344 (1939).

Rock Royal did not involve producers, but only handlers and therefore a different provision of the statute. Moreover, the differential payments there involved depended upon the location of the plant to which delivery was made, and not the location of the delivering farmer.

[41] The nearby farmers also argue that, since the nearby differential is a key provision of the order, its invalidation effectively invalidates the entire order until the Secretary has readopted it *and* it has been approved in a referendum by two-thirds of the producers in the market. The Secretary, however, rejects this construction, relying on the following severability provision in the order:

> If any provision . . . is held invalid, the application of . . . the remaining provisions . . . shall not be affected thereby.

7 C.F.R. § 1001.96 (1968).

cases such as *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944), and *FPC* v. *Idaho Power Co.*, 344 U.S. 17 (1952).

Those decisions do enunciate the principle that a court cannot always assume that an agency, had it been aware of the limits of its authority, would have promulgated an order differing only in the absence of the provision judicially declared unlawful. That principle, however, does not obtain here. The 1964 order contains an explicit severability clause, clearly indicating that all parties contemplated that judicial invalidation of some provisions would not upset the remainder. Moreover, unlike the provisions involved in *Addison* and *Idaho Power*, the nearby differential is discrete. There is nothing to suggest that elimination of it irretrievably impairs the Secretary's power and purpose to administer the significant regulatory scheme embodied in the remaining provisions of the order. He has simply been told to discontinue illegal payments under the order. Since any discrimination attributable to farm location would appear to be invalid, there is no reason to afford him a chance to disburse them under a different name.[42]

V.

Although we affirm the judgment of the District Court, we must deal with the distant producers' claim of equi-

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[42] The injunction is prospective only; the Secretary and the producers can do what they wish with the order hereafter. Unlike the situation in *Idaho Power*, the District Court's injunction did not constitute a command that the Secretary continue the order without the illegal provision. And, since there will be no retroactive recovery in this case, the injunction, as compared with the decision of the circuit court in *Addison*, has no impact on rights arising from events which occurred before the date of the court's judgment.

table entitlement in respect of the escrow fund.[43] The complaint was filed on December 27, 1966, and the escrowing commenced with the preliminary injunction of January 16, 1967. Final judgment was entered by the District Court on June 15, 1967. In the exercise of our duty, as a court of equity, to "tailor . . . relief with a critical and balanced view of the ramifications of [the] decision,"[44] we have decided that the monies escrowed before June 15, 1967 should be disbursed to the nearby farmers and that the distant producers are entitled to amounts thereafter collected.

In support of their claim, the nearby producers point out that the nearby differential was in operation for almost 30 years before it was challenged in court and that the nearby farmers have relied upon it over that period in making economic decisions and investments.[45] In par-

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[43] We do not think the case need be remanded—as all appellants urge—for either the Secretary or the District Court to determine in the first instance the equitable distribution of the escrow fund. Further delay is unnecessary, the facts are not in dispute, and neither possesses a peculiarly informed discretion on this question to which this court should defer.

[44] 370 F. 2d at 239.

[45] Both the Secretary and the nearby farmers had relied heavily on this line of argument in the 1964 and 1967 decisions and the 1964 hearings. Thus, the principal reason advanced for continuation of the nearby differentials was that they were "deeply embedded" in the New England milk marketing structure; to remove them would be grossly unfair to nearby producers who had relied upon them in voting for the order originally and in negotiating loans and making capital commitments. The nearby differentials had, it was asserted, become capitalized into land values; and if the differentials were to be abandoned or reduced, then it should be accomplished very gradually. Moreover, some witnesses predicted that if the differentials were removed, nearby producers would overproduce to make up for lost revenues, or even worse, they would be forced out of business by high local production costs—an event which must be forestalled in order to preserve

ticular, they allege reliance upon the First Circuit's decision in *Green Valley*.[46] Because it was, in language at least, an explicit judicial approval of the farm location differential, they suggest that the payments should not be terminated until the differential has finally been deter-

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an adequate supply of nearby milk and therefore greater economy for the urban consumer. Others hypothesized that nearby producers, deprived of their price advantage under the federal order, would go into business as producer-dealers, thereby removing many Class I sales from the pool and lowering the blended price. Such a development would also force out of business the small dealers who cannot economically import distant milk and who rely on nearby sources, this in turn would contribute to the undesirable trend toward monopolization in the distribution of milk. Finally, the Secretary was warned of the catastrophic inter-market dislocations which would accompany elimination of the nearby differentials. Such a step would attract vast supplies of milk from the surrounding areas, flooding the New England markets and eventually depressing the price. The Secretary was clearly much impressed with this line of testimony. In his 1967 recommended decision he noted that "the business decisions of nearby producers have been influenced over the years by the higher returns," and that the differential would "promote orderly marketing of milk in the Boston area, and prevent disruption in the normal supplies of milk for the Boston area and thus tend to effectuate the declared purposes and policies of the Act." 32 Fed. Reg. 9902, 9919 (1967).

We are not insensitive to the Secretary's efforts to preserve the public interest in the vastly complex regulation of milk marketing. As we said in *Blair*, however, "this may be a reason for the legislature to enlarge the Secretary's powers, but not for the court to overlook the limited nature of the authority hitherto conferred by Congress." 370 F. 2d at 239.

[46] In his 1967 recommended decision, the Secretary noted that he too had relied on *Green Valley*:

> It was subsequent to, and substantially in reliance upon, this decision that farm location differential provisions were considered to be legal and proper for inclusion in other New England orders.

32 Fed. Reg. 9902, 9920 (1967).

mined invalid by a court of at least equal rank in the federal judiciary.

We recognized in *Blair* that the plaintiffs' long acquiescence in the differential and their years of enjoyment of a blended price and stable marketing conditions in the milkshed were significant factors bearing upon their entitlement to equitable relief. In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, after full opportunity for the presentation of views on both sides, by a court. We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967.

We are not persuaded that the endorsement of the nearby differential in *Green Valley* further alters the equities between the parties. The nearby producers' reliance on that opinion is amply recognized by preserving their preference until it has been finally invalidated by a responsible court having jurisdiction to do so. Their expectations cannot seriously be said to encompass a decision to that effect by a Court of Appeals but not by a District Court.

The judgment appealed from is affirmed and the case remanded to the District Court for further proceedings consistent herewith.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1968

No. 21,141

Civil 3379-66

FREDERICK T. ZUBER, *et al., Appellants*

v.

RUSSELL ALLEN, *et al., Appellees*

No. 21,308

ORVILLE FREEMAN, Secretary of Agriculture, *Appellant*

v.

RUSSELL ALLEN, *et al., Appellees*

Appeals from the United States District Court for the District of Columbia.

Before: Burger, Wright and McGowan, Circuit Judges.

Judgment

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION THEREOF, it is ordered and adjudged by this court that the judgment of the District Court appealed from in these cases is affirmed, and these cases are hereby remanded to the District Court for further proceedings consistent with the opinion of this court.

Per Curiam

For the Court:

NATHAN J. PAULSON,
Clerk

Dated: September 23, 1968

APPENDIX C

Opinion in Green Valley Creamery v. United States, 108 F.2d 342 (1st Cir. 1939)

Before WILSON and MAGRUDER, Circuit Judges, and McLELLAN, District Judge.

MAGRUDER, Circuit Judge.

These were suits in equity brought by the United States of America and the Secretary of Agriculture seeking mandatory injunctions requiring the defendants to comply with the provisions of Order No. 4 as amended, issued by the Secretary under the authority of the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246, 7 U.S.C. § 608c, 7 U.S.C.A., § 608c. The Order regulates the marketing of milk in the Greater Boston Marketing Area. Defendants are dealers in or handlers of milk in that area. Temporary injunctions were issued by the District Court. United States v. Whiting Milk Co., D.C., 21 F.Supp. 321. Upon appeal, these injunctions were stayed in part by an order of supersedeas pending final determination on the merits. H. P. Hood & Sons, Inc. v. United States, 1 Cir., 97 F.2d 677. The District Court referred these cases together with twenty-five others of the same sort to a Master for hearing and findings of fact. The Master's report came in and was duly confirmed by the court, which issued final decrees permanently restraining the numerous defendants from violating any of the terms of Order No. 4 as amended. United States v. H. P. Hood & Sons, Inc., D.C., 26 F. Supp. 672. Thereafter, two of this group of thirty cases, the Hood and Whiting Milk cases, after being docketed on appeal in the Circuit Court of Appeals, went up on certiorari to the Supreme Court, which affirmed the decrees of the District Court. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. See also United States v. Rock Royal Cooperative, Inc., 307 U.S. 533, 59 S. Ct. 993, 83 L. Ed. 1446. In view of the sweeping nature of the Supreme Court's opinions in

these cases, this court, upon motion by the Government in the cases now before us, entered an order vacating the supersedeas which the District Court had issued staying in part the operation of its final decrees pending decision on appeal. Green Valley Creamery, Inc. v. United States, 1 Cir., 105 F.2d 754.

Detailed quotations from the Act and the Order are set forth in the opinions of the Supreme Court in the Hood and Rock Royal cases, supra, and need not be repeated here. Article III of the Order sets up classifications of milk according to the use to which it is put, because such use primarily determines the market value of the milk. Class I embraces fluid milk disposed of for consumption in that form as an article of diet. Class II embraces milk disposed of for non-fluid purposes, such as the manufacture of butter or ice cream. Article IV establishes minimum prices to be paid by handlers of Class I and Class II milk, respectively. While in the net result these prices are paid by handlers for the milk that they buy and dispose of, the individual producers do not receive payment on this basis. The Order creates a market-wide pool as an equalization device under which the individual producer is paid a uniform composite price for the milk which he sells, based upon the use made of all the milk sold in the Greater Boston Marketing Area. A Market Administrator computes for each delivery period the use value of the milk sold or used by each handler, multiplying the quantity of such milk in each class by the applicable class price and adding together the two sums (Art. VII, Sec. 1). Then the Administrator combines into one grand total the respective values of the milk sold or used by each handler, and after adjustments for various differentials the adjusted total is divided by the total quantity of milk. The result is a "blended" or uniform price which all producers are to receive for milk delivered by them during the period, regardless of the use to which any particular milk is devoted.

The blended price is less than the Class I price and more than the Class II price as fixed by Article IV of the Order. A handler who has more than the market average of Class II milk sales during a particular delivery period will have to pay to his producers at the blended price an amount greater than the total amount charged to him as the use value of the milk he has received from producers during that period. Such a handler will therefore be credited with the difference in his producer settlement account on the books of the Market Administrator and becomes entitled to receive from the Administrator an equalization payment out of the pool. On the other hand, a handler who has more than the market average of Class I fluid milk sales during the same delivery period will pay to his producers at the blended price an amount less than the total amount charged to him as the use value of the milk he has received from producers during the period. Such a handler will therefore be debited with the difference in his producer settlement account, and is required by Article VIII, Section 1, of the Order to pay this amount into the pool. Omitting refinements, the debits and credits in the pool should normally balance out in each delivery period.

This market-wide equalization pool is the core of the regulatory scheme set up by Order No. 4 as amended.

Appellants may no longer question the constitutionality of the Act nor the validity of most of the terms of Order No. 4 as amended. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478. Argument was addressed to us on three provisions of the Order which are asserted to be unauthorized by the Act. These points were raised in the District Court in the Hood and Whiting Milk cases but were not pressed before the Supreme Court. Hence, they are still open for consideration

here. The portions of the Act now relevant are set forth in the footnote.[1]

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[1] "Sec. 8c [§ 608c] (Relating to Orders).

(5) "Terms—Milk and Its Products In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) • • •

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased

[1] Article IV of the Order provides for two sets of minimum prices, one to be applicable if the purchase is from an association of producers, and the other if the purchase is from producers not members of an association. It is contended that under Section 8c (5) (A) of the Act the minimum price must be uniform, subject only to certain adjustments therein set forth, none of which is dependent upon the class of producers from which the milk is received. In promulgating the Order the Secretary of Agriculture found as a fact, upon evidence introduced at the administrative hearings, "that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers." It is not denied that there was evidence before the Secretary warranting a finding that such a differential had customarily been applied in the market area, for the reason that milk purchased from associations of producers has an enhanced value due to the fact that many marketing services have already been performed by such associations. In view of these facts, we think that the Government is right in its contention that this differential in prices applicable to milk received from producers and milk received from

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by him at the prices fixed in accordance with paragraph (A) hereof.

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(6) "Terms—Other Commodities

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(7) "Terms Common To All Orders In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

* * * * * * * * * * *

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

associations of producers is authorized by Section 8c (5) (A) (1) of the Act as a market differential customarily applied by handlers. The phrase "market differential," undefined as it is in the Act, is reasonably susceptible of such an interpretation. If further support for this conclusion were needed, it would be found in the fact that the Secretary in promulgating the original Order No. 4 on February 9, 1936, construed Section 8c (5) (A) of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 754), as authorizing such a differential in price as between producers and associations of producers, and Congress subsequently re-enacted without amendment this portion of that Act in the Agricultural Marketing Agreement Act of 1937. 50 Stat. 246. It is hardly significant that this particular price differential is not specifically called a market differential in the Order.

[2] Next, the appellants take exception to a provision of Article VII, Section 2 of the Order, specifying the method of computing the blended or uniform price. This section excludes from such computation the milk of handlers who are in default in the required equalization payments "for milk received during the delivery period next preceding but one." Each month is divided into two delivery periods. By Article VII, Section 7, the Administrator is required to compute and announce on or before the twelfth day after the end of each delivery period the blended price applicable for that period. Handlers are not required to make the payments required by Article VIII until the twenty-fifth day after the end of each delivery period. Therefore, at the time the Administrator computes the blended price for the preceding delivery period, handlers are not yet in default in respect to that period. For this reason the Order requires the Administrator to ascertain whether a particular handler is in default on payments required for milk received during the delivery period next preceding but one. If such delinquency exists, the milk of that handler is excluded from

the current computation of the blended price. The purpose of this provision seems to be to minimize the risk that the equalization pool will fail to be self-liquidating for a particular delivery period on account of defaults by handlers obligated to the pool in the manner previously described in this opinion. "If a handler has so failed in one delivery period it is reasonable to expect that he may repeat his failure in the next."

The Act does not specify the detailed method by which a blended or uniform price is to be computed. The method adopted in Article VII of the Order seems reasonably adapted to promoting the successful operation of the equalization pool, which, in turn, is a device calculated to insure the payment to producers of uniform prices for all milk delivered to handlers, irrespective of the uses made of such milk by the individual handler to whom it is delivered (Act, Sec. 8c (5) (B) (ii)). Defaulting handlers are subject to penalties in the Act, and though their milk has been excluded from the computations of the pool, they are nevertheless liable to pay their producers at the announced blended price. If they later made good their pool debits, such payments will be reflected in an increased blended price for a later delivery period.

In addition to what has been said, it is questionable whether these appellants are in a position to attack the validity of the provisions of the Order dealing with the computation of the blended price. While the exclusion of milk of a defaulting handler may affect the blended price, the Master points out that the level of the blended price does not affect in any way the total charge to handlers participating in the pool, which is computed not on the basis of the blended price but rather on the basis of the minimum prices fixed in Article IV of the Order for the milk a handler receives from producers in a particular delivery period.

[3] Appellants further challenge the validity of certain differentials provided for in Article VIII, Section 4, para-

graphs 3 and 4, of the Order. The section is set forth in the footnote.[2] It is argued that differentials based upon the location of the farms of producers are not authorized by Section 8c (5) (B) (ii) (c) of the Act, which authorizes only differentials based upon "the locations at which delivery of such milk is made."[3] There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with

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[2] "Sec. 4. Location Differentials.—The payments to be made to producers by handlers pursuant to paragraph 1 of section 1 of this article shall be subject to differentials as follows:

"1. With respect to milk delivered by a producer to a handler's plant located more than 40 miles from the State House in Boston, there shall be deducted an amount per hundredweight equal to the freight (considering 85 pounds of milk per can), according to the tariff currently approved by the Interstate Commerce Commission for the transportation, in carload lots of milk in 40-quart cans, to Boston from the zone of location of the handler's plant.

"2. With respect to milk delivered by a producer to a handler's plant located not more than 40 miles from the State House in Boston, there shall be added 18 cents per hundredweight.

"3. With respect to milk delivered by a producer, whose farm is located more than 40 miles, but not more than 80 miles, from the State House in Boston, there shall be added 23 cents per hundredweight.

"4. With respect to milk delivered by a producer, whose farm is located not more than 40 miles from the State House in Boston, there shall be added 46 cents per hundredweight unless such addition gives a result greater than $3.19, in which event there shall be added an amount which will give a result of $3.19."

[3] See footnote 1, supra.

handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect. Milk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market; and thus, paragraphs 3 and 4 of Section 4, Article VIII, may be said to prescribe differentials having relation to locations at which deliveries are made. This argument need not be labored, however, for the differentials can readily be sustained under Section 8c (5) (B) (ii) (a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called "location differentials" in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market.

Here again it may be observed that similar differentials were contained in the original Order No. 4, effective February 9, 1936, under an administrative interpretation of provisions of the Agricultural Adjustment Act of 1933, as amended (49 Stat. 750), which were re-enacted without change in the Agricultural Marketing Act of 1937.

[4] Furthermore, we think the Government is right in its contention that the present appellants have no standing to challenge the Order in this particular. These differentials in favor of nearby farms do not affect the net cost of the milk to handlers, computed on the basis of the minimum prices established in Article IV of the Order. They are adjustments affecting only the distribution among producers out of the equalization pool.

[5, 6] Several additional points were urged in appellants' brief. They all assumed the validity of the Act and of the Marketing Order, and related merely to details of administration as to which it was contended that the Mar-

ket Administrator did not follow the terms of the Order. Only in the exceptional case of manifest error should a court undertake to upset interpretations of a highly technical administrative order made by the responsible official to whom has been delegated the administration of the order. This is especially true where, as in this case, the Act provides machinery whereby any handler subject to the Order may obtain administrative review by the Secretary of Agriculture of the actions of the Market Administrator. At the oral argument, counsel for appellants stated that they would not ask us to pass upon these points of administrative detail but that they proposed to apply to the Secretary of Agriculture for a review on these points under Section 8c (15) (A) of the Act. Accordingly we do not now examine into them.

[7] It is further urged by appellants that the decree of the District Court should be reversed for failure of the court to make findings in accordance with Rule 52 (a) of the new Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c. The court confirmed and adopted as its own the findings of fact set forth in numbered paragraphs of the Master's report. In respect to conclusions of law the court stated, 26 F. Supp. 672, 681: "Insofar as I have dealt with questions of law, my statements in the opinion shall be regarded as conclusions of law for the purpose of the record." The decree should not be reversed for this reason, and under the circumstances no useful purpose would be served by remitting the case for a more formal statement of the district judge's conclusions of law. H. P. Hood & Sons, Inc. v. United States, 307 U.S. 588, 59 S. Ct. 1019, 83 L. Ed. 1478.

In each case: The decree of the District Court is affirmed.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 67-CV-38

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Plaintiffs,*

vs.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant,*

and

ALBERT GUILIAN, GROVER C. ATWOOD, and A. J. MALNATI, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Defendant-Interveners.*

APPEARANCES

John P. Weatherwax, Troy, N. Y. (James M. Strang, Troy, N. Y., of counsel) for plaintiffs.

J. C. Krause and John G. Liebert, Attys, Dept. of Agriculture, Wash. D. C.; Jane M. Friedman, Irwin Goldbloom, Harland F. Leathers, Attys, Dept. of Justice, Wash, D. C.; Justin J. Mahoney, U. S. Atty, and Frank A. Dziduch, Asst. U. S. Atty, Albany, N. Y., for defendant Freeman.

Frederick H. Conard, Jr., Don C. Polley, and Theodore Space of Shipman & Goodwin, Hartford, Conn., for defendant-interveners.

Memorandum of Decision After Trial

TIMBERS, District Judge.*

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* Chief Judge of the District of Connecticut, sitting by designation.

Question Presented

This action was brought by six dairy farmers residing in Rensselaer County, New York, suing for themselves individually and on behalf of all other persons in their class similarly situated and affected.[1] They seek declaratory and injunctive relief against the Secretary of Agriculture. Three other dairy farmers residing in Litchfield County, Connecticut, and Berkshire County, Massachusetts, for themselves individually and on behalf of all other persons in their class similarly situated and affected, were permitted to intervene as defendants. The essential questions presented are: (1) whether the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq., authorizes the Secretary of Agriculture to include in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015, et seq. (1968), certain farm location differentials, 7 C.F.R. § 1015.72 (1968), which have been in effect since 1959; (2) whether the farm location differentials are unconstitutionally discriminatory; and (3) whether there is substantial evidence in the administrative record to support the Secretary's inclusion of these differentials in the Connecticut Milk Marketing Order.

After an eight day trial, the Court holds that the Act does authorize the farm location differentials, that such differentials are not unconstitutionally discriminatory; and that there is substantial evidence in the administrative record to justify inclusion of these differentials in the Connecticut Milk Marketing Order. Accordingly, a permanent injunction enjoining the Secretary of Agriculture from administering the Connecticut Milk Marketing Order in such a way as to give effect to the farm location differentials is denied.

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[1] Since commencement of the action Roy E. Ottman and George Mesick, Jr., two of the six persons originally bringing the action, have sought leave to withdraw as plaintiffs.

Jurisdiction and Venue

Jurisdiction is founded upon 28 U.S.C. § 1331(a), 28 U.S.C. § 1337, 28 U.S.C. §§ 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601, et seq.

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(e).

Propriety of Class Action and Class Action Defense; Adversary Nature of Proceedings

Pursuant to Rule 23(c)(1), Fed. R. Civ. P., the Court on October 20, 1967, after hearing evidence, entered two orders: one permitting the named plaintiffs to maintain the instant action as a class action and the other permitting the named defendant-interveners to maintain a class action defense.

With respect to the named plaintiffs, the Court determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015, et seq. (1968), where the farms of such producers are located *outside* the area described in 7 C.F.R. § 1015.72(a) (1968) (in short, those who do *not* qualify for the 46¢ differential).

With respect to the three named defendant-interveners, the Court likewise determined, pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., that they may properly represent the interests of those producers producing and selling milk produced on their respective farms to handlers operating under the order regulating the handling of milk in the Connecticut marketing area, 7 C.F.R. § 1015, et seq. (1968), where the farms of such producers are located *within* the area described in 7 C.F.R. § 1015.72(a) (1968) (in short, those who *do* qualify for the 46¢ differential).

In view of the recent decision of the United States Court of Appeals for this Circuit in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2 Cir. 1968), the Court on April 22, 1968 directed that all members of plaintiffs' and defendant-interveners' classes be given formal notice of the pendency of the action and an opportunity to be heard with respect to the continued maintenance of the action as a class action. The notices were sent by April 24, 1968 and made returnable on May 15, 1968.

Prior to the Court's order of April 22, 1968, Kenneth Hewitt and Leonard Duncan, members of plaintiffs' class, filed two papers entitled "Motion For Leave To Intervene Under Rule 24 or to Otherwise Enter Action Under Rule 23 for Purpose of Taking Depositions, to Move Dismissal of Suit and for Other Related Relief," and "Answer of Interveners and Motion to Dismiss Action, for Disposition of Escrow Fund and Other Relief." Because these papers made allegations of collusion which if true would not only have merited reversal of the class action orders but dismissal of the action, a hearing was similarly directed on May 15, 1968.

The Court thereafter held exhaustive hearings on May 15, May 27, and June 10, 1968 at which time all questions relating to the propriety of the maintenance of this action as a class action and all questions relating to Hewitt's and Duncan's claim of collusion were explored. Every interested person was given an opportunity to be heard and to present evidence through the testimony of witnesses and by means of exhibits. The complete record of all prior proceedings in this case was available for inspection by all interested persons at the Albany seat of Court from May 9, 1968.[2]

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[2] The Court's order of April 22, 1968 provided for the immediate availability of the record at the Albany seat of Court. At the time the order was entered, the undersigned was sitting by designation in the Southern District of New York while the record was located at Bridgeport, Connecticut, the undersigned's official sta-

The evidence presented not only does not in any way justify dismissal of the action but it clearly merits reaffirmation of the Court's orders of October 20, 1967 permitting plaintiffs and defendant-interveners to maintain this action as a class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P. Plaintiffs' class of approximately 250 persons and defendant-interveners' class of approximately 3000 are without any doubt "so numerous that joinder of all members is impracticable." No one has, nor can, dispute that there are questions of both law and fact common to the classes and that the claims of plaintiffs and defenses of defendant-interveners are typical of the claims and defenses of their classes. Furthermore, as a practical matter, the adjudication of the differentials' validity with respect to individual members of the classes would be dispositive as to all class members because the differentials cannot be enforced or withdrawn piecemeal.

The only issue which merits discussion is the charge of collusion raised by Hewitt and Duncan. Also involved here is the issue of fairness and adequacy of representation with respect to plaintiffs' maintenance of this action as a class action. Basically, Hewitt and Duncan claim that the Consolidated Milk Producers' Association (CMPA), formerly the Connecticut Milk Producers' Association, solicited plaintiffs to bring this action in the Northern District of New York, and through payment of plaintiffs' counsel fees and other means have acted to control this action for the benefit of defendant-interveners' class who constitute the majority of the Association's members.

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tion. It was not until May 6, 1968 when the undersigned's assignment in the Southern District of New York was completed, that the undersigned found it possible to return to Bridgeport to prepare the record, comprising numerous cartons, for shipment to Albany. The undersigned, however, is completely satisfied that all who desired to examine the record were aware of its availability after May 9, 1968 and had ample opportunity to study it. No prejudice resulted from the delay.

There is no question but that CMPA as an organization is interested in the continuation of farm location differentials. The vast majority of its members receive these differentials and feel that it will be to their benefit to continue to receive them. Defendant-interveners are members of CMPA and their counsel also serves as counsel to CMPA. Furthermore, CMPA readily admits that after the farm location differentials in the neighboring New York-New Jersey Milk Marketing Order were held invalid by the Court of Appeals for the District of Columbia in 1966, the Association was troubled by the consequential uncertainty surrounding the validity of the Connecticut differentials. Part of this concern derived from the fact that a minority of its members, including all the named plaintiffs, did not receive the differentials and had vocally expressed their unhappiness with the situation. In fact, as established by the credible evidence, plaintiff Cranston had discussed the institution of a legal action to challenge the differentials with his long-time friend and neighbor, Attorney John P. Weatherwax, both before and after the decision in the District of Columbia.

It was only after Attorney Weatherwax had agreed to undertake such an action challenging the differentials, that Cranston was contacted on January 27, 1967 by a CMPA official who had heard rumors that Cranston and others intended to commence a suit. This contact was the result of a decision on January 25, 1968 by CMPA to aid any members undertaking either to challenge or defend the differentials by reimbursing such members for reasonable expenses and attorney fees. The CMPA official explained the policy and mentioned a name of a potential attorney, but Cranston said that he already had his own. The official told Cranston that he would like to check on his reputation and see what kind of an attorney he was and if he was capable, because the Association was concerned about having good attorneys on both sides of the question. Aside from the offer to reimburse for reasonable expenses

and this conversation and a subsequent meeting between CMPA officials, plaintiffs and Attorney Weatherwax, there is nothing to suggest that CMPA in any way acted improperly. But most importantly, there is not an iota of credible evidence that CMPA, defendant-interveners, or defendant, acted, attempted to act, or even desired to act, to control plaintiffs' conduct in these proceedings. On the contrary, the record clearly demonstrates that plaintiffs for a number of years have been keenly interested in the abolition of the differentials, that they are at this time just as keenly interested, and that their counsel, Attorney Weatherwax, has at all times conscientiously, expertly and with the highest professional sense of duty to plaintiffs endeavored to represent their aims. Attorney Weatherwax has forthrightly, earnestly, and unceasingly prosecuted this lawsuit to enjoin the application of the differentials. He has conducted his case as any gentleman and lawyer should and would and has never conceded a point nor failed to present a plausible argument.

The Court is fully cognizant that the payment by one side in an action of an opposing counsel's legal fees is a red flag as to collusion. See *United States* v. *Johnson,* 319 U.S. 302 (1943). But in the instant situation, the Association is in a unique position—it is a democratic institution composed of members on both sides of the question and it is duty-bound to serve the interests of all its members. Certainly under these circumstances, the Association's offer to reimburse any of its members for expenses does not give rise to collusion per se. Rather the question must be whether the Association has in any way acted to control plaintiffs' conduct of the law suit. *Cf. San Francisco* v. *Boyd,* 22 Cal. 2d 685, 140 P.2d 666 (1943). If the Court thought that there was even the slightest attempt to exert such control, it would not only reverse its class action orders but it would dismiss the entire action. The Court, however, is thoroughly convinced that no such attempt was made, that the proceedings have been of an adversary

nature on the highest level, and that plaintiffs have fairly and more than adequately represented the other members of their class. The Court therefore not only refuses to dismiss this action but reaffirms its decision to permit it to proceed as a class action.[3]

The Agricultural Marketing Agreement Act of 1937 and the Connecticut Milk Marketing Order

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, et seq., confers upon the Secretary of Agriculture the power to regulate the price and marketing of milk and milk products, as well as various other agricultural commodities. With respect to the milk industry, the Act represents the ultimate attempt by Congress to deal with a "nation-wide distress of milk farmers, a distress which had culminated in a milk farmers' 'strike'—accompanied by violence and constituting an incipient agrarian revolution—that threatened to cut off a vital part of the nation's food supply." *Queensboro Farms Products* v. *Wickard,* 137 F.2d 969, 974 (2 Cir. 1943), (J. Frank).

The basic factors giving rise to what Judge Frank described as the "exquisitely complicated 'milk problem'" were set forth by the Supreme Court in *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533, 549-50 (1939):

> "It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a

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[3] Three members of plaintiffs' class have asked to be excluded therefrom and plaintiffs' counsel has asked the Court to grant this request. The action, however, is a class action pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P., and, unlike a class action pursuant to Rule 23(b)(3), an otherwise proper member of the class cannot be excluded simply because he expresses such a desire.

The Court does, however, modify its order of October 20, 1967 with respect to the maintenance of this action as a class action by plaintiffs to the extent of eliminating as named plaintiffs Roy E. Ottman and George E. Mesick, Jr., who have signified their desire to withdraw as plaintiffs.

normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. . . . Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market."

The first far-reaching Congressional attempt to meet the problem was the Agricultural Adjustment Act of 1933. That act provided for marketing agreements and authorized the Secretary of Agriculture to issue "licenses" for the regulation of agricultural commodities including milk and milk products. In 1935, this Act was amended, partly in order to meet the delegation problems raised by the Supreme Court's decision in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935). These amendments were subsequently reaffirmed and reenacted by Congress in the Agricultural Marketing Agreement Act of 1937 (the Act), and, as such, represent the legislative scheme extant today and that involved in this litigation.

In order to achieve such orderly marketing conditions as will establish "parity" prices for the dairy farmer and a level and sufficient flow of milk to the market (Section 2 of the Act, 7 U.S.C. § 602), the Act authorizes the Secretary of Agriculture to issue milk marketing orders for the

various sections of the country and specifies the terms and conditions which may be included in them.[4] Section 8c(5)

[4] Section 8c(5) of the Act, 7 U.S.C. § 608c(5), governing the issuance of milk marketing orders provides in relevant part as follows:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.
>
> (B) Providing:
>
> (i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . . ; or
>
> (ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;
>
> subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.
>
> (C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method

(A) of the Act, 7 U.S.C. § 608c(5)(A), provides for the classification of milk by each order according to milk's various uses, and for the establishment of a minimum price for each category. Thus, under the Connecticut Milk Marketing Order, which is involved in this litigation and which regulates all milk marketed in Connecticut whether produced in the state or shipped into the state from elsewhere, there are two general categories. 7 C.F.R. §§ 1015.51 and 1015.52 (1968). One category consists essentially of fluid milk used for beverage purposes while the other consists primarily of milk used for nonfluid purposes. The minimum price for the category of milk used for fluid purposes is the higher to reflect the desirable position of such milk in the marketplace. 7 C.F.R. § 1015.60 (1968). When the "handler", the party who first purchases the farmer's milk either directly or through a marketing cooperative, disposes of milk, he ultimately becomes obligated for the minimum price associated with the use to which that particular milk is put.

Section 8c(5)(B) of the Act, 7 U.S.C. § 608c(5)(B), provides, however, that the individual farmer is not to receive payment according to the use of his particular milk. Instead, he is to be paid a uniform price determined either on the basis of the total obligations of the handler to which he delivers his milk or on the basis of the total or pooled obligations of all the handlers covered by an order. Under the Connecticut Order the uniform, or blend price,

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for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

• • •

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

is determined under the latter alternative. 7 C.F.R. § 1015.64 (1968). Thus, each handler pays this blend price, adjusted for certain factors to be discussed subsequently, to the farmers or cooperatives from whom he makes his purchases. By paying a farmer according to the market-wide utilization of milk rather than according to the utilization of his particular milk, competition among farmers to sell their milk for fluid use is eliminated.

Since the amount for which a handler becomes obligated is determined on the basis of the use of only the milk he handles, and the amount due his farmers is determined by the use of all the milk covered by the Order, Section 8c(5)(C), 7 U.S.C. § 608c(5)(C), permits resort to a "producer settlement fund" to bring the two amounts into balance. If in any month the utilization value of a handler's milk exceeds the blend price value, the handler must pay the difference into the fund. On the other hand, if the utilization value is less than the blend price value, the handler withdraws the difference from the fund. See 7 C.F.R. §§ 1015.80—1015.82 (1968).

As already noted, the uniform price otherwise payable to each farmer is subject to certain adjustments. Section 8c(5)(B), 7 U.S.C. § 608c(5)(B), specifically authorizes adjustment for "volume, market and production differentials customarily applied by the handlers subject to [the] order" and adjustments for "the grade or quality of the milk delivered" and "the locations at which delivery of such milk is made."

The Connecticut Milk Marketing Order contains three principal adjustments to the uniform price payable to dairy farmers. Section 1015.71 of the Connecticut Milk Marketing Order, 7 C.F.R. § 1015.71 (1968), provides for a "butterfat differential". Under it a farmer receives either more or less than the uniform price according to whether and by how much the butterfat content of his milk exceeds or falls below a standard level. This differential is clearly related to the grade or quality of the milk and

is, therefore, unquestionably authorized by the Act. It is not challenged here.

Section 1015.62 of the Order, 7 C.F.R. § 1015.62 (1968), providing for "plant zone differentials", is also unchallenged. Under this section a farmer receives a lesser price as the distance from Hartford of the handler's plant receiving the farmer's milk increases. The section, however, treats all plants in Connecticut irrespective of their distance from Hartford and those plants in Rhode Island and Massachusetts which are not more than fifty miles from Hartford as if they were in Hartford. The result is that only those producers who deliver their milk to plants outside of this wide area receive a price which decreases as the actual road mileage from Hartford increases. Essentially, the purpose of the differential is to reflect in the price received by the farmer the added cost to the handler of moving the milk from the more distant receiving plants into the marketing area for distribution. Such a differential is clearly authorized as an adjustment according to "the locations at which delivery of such milk is made."

The third differential, referred to in the plural as "farm location differentials" because it consists of two parts, is found in Section 1015.72 of the Order, 7 C.F.R. § 1015.72 (1968). It is the validity of this provision which plaintiffs attack. Section 1015.72 provides:

> "(a) In making payments to producers for milk received from a farm located in Connecticut, Rhode Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.
>
> (b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush,

Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight.

(c) The uniform price for pool milk other than producer milk shall be subject to the applicable differentials for milk received from farms located in the areas set forth in paragraphs (a) and (b) of this section . . . ."

What this means essentially is that farmers selling milk under the Connecticut Order whose farms are located in Connecticut, Rhode Island and certain neighboring sections of New York and Massachusetts receive either 46 or 23 cents more per hundredweight for their milk than other farmers whose farms are located outside of this area but who still market their milk in Connecticut. The obligations of the handlers are not increased to provide for payment of these differentials. Rather the uniform blended price is decreased so that the total or pooled obligation of all the handlers will be sufficient to cover payment of both the uniform blend price to all farmers under the Order and the additional 46 and 23 cents per hundredweight payable to those designated under this section. Therefore, because the provision results in a lower uniform blend price, those who receive only this price and no differential have standing to attack the provision. *Stark* v. *Wickard*, 321 U.S. 288, 302-311 (1944); *Blair* v. *Freeman*, 370 F.2d 229, 234 (D.C. Cir. 1966). Furthermore, those farmers now receiving the 23 cent differential would receive a still higher price for their milk if there were no "farm location differentials" at all. Consequently these farmers have a similar interest and standing to challenge the provision. For this reason the Court has permitted plaintiffs who are composed both of farmers not receiving any differential and of farmers receiving the 23 cent differential to represent all such farmers as a single class in this action.

Claimed Lack of Authorization For Farm Location Differentials

1. *Uniform Price Requirement*

Plaintiffs' primary contention in challenging the validity of the farm location differentials is that the differentials are unauthorized departures from the requirement of Section 8c(5)(B)(ii) of the Act, 7 U.S.C. § 608c(5)(B)(ii), that farmers receive a "uniform" price for all their milk "irrespective of the uses made of such milk by the individual handler to whom it is delivered. . . ." The farm location differentials do, of course, result in a variation in the price received by different farmers. But as agreeable as the concept of price uniformity may be in the abstract, Congress quite obviously did not look upon price uniformity as an absolute rule or even as a goal in itself. For one thing, Congress specifically provided in Section 8c(5)(B) of the Act for adjustments to the uniform price. Furthermore, Congress drafted the Act to allow marketing orders to provide for individual handler pools rather than a market wide pool. Section 8c(5)(B)(i) of the Act. In other words, at the option of the Secretary and with the approval of the dairy farmers, the Connecticut Order could simply direct that each farmer receive payment from his handler according to the utilization of all the milk disposed of by only that particular handler instead of according to the utilization of all the milk disposed of in the entire market. If this were done there would be no uniformity of price among farmers selling their milk to different handlers.

What Congress hoped to achieve was orderly marketing conditions and higher prices. Sections 1 and 2 of the Act, 7 U.S.C. § 602. The attainment of these aims depends in large part upon the elimination of the incentive among dairy farmers to compete for the higher priced fluid milk market. For this reason, Congress set down the general principle that the price paid a farmer for his milk should remain the same "irrespective of the uses made of such

milk." Therefore, a variation from price uniformity is not repugnant to the Act simply because it is a variation but will be considered so if the effect of the variation is to increase competition. As the Supreme Court stated in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 79 (1962), "[i]t is in order to avoid destructive competition among milk producers for the premium outlets that the statute authorizes the Secretary to devise a method whereby uniform prices are paid by milk handlers to producers for all milk received, regardless of the form in which it leaves the plant and its ultimate use." The farm location differentials do not in any manner stimulate competition for the fluid milk market since the differentials are paid solely on the basis of the location of a producer's farm and without any regard to the particular use made of the individual producer's milk.

This is to not to say that the Secretary can include in a milk marketing order any adjustments to the uniform price which he thinks advantageous and which do not bring about ruinous competition or a disorderly market. Quite the opposite is true. The plaintiffs correctly point out that in enacting the 1935 amendments to the Agricultural Adjustment Act of 1933, Congress was greatly concerned lest milk marketing regulation fall prey to the delegation infirmities noted by the Supreme Court's then recent opinion in *A.L.A. Schechter Poultry Corp.* v. *United States*, *supra*. Congress carefully attempted to delineate and circumscribe the Secretary's powers.[5] Section 8c(5) provides

[5] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 8 (1935), issued in connection with the 1935 amendments to the Agricultural Adjustment Act of 1933, states that, "To eliminate questions of improper delegation of legislative authority raised by the decisions in *Schechter, et al.* v. *United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities."

that milk marketing orders shall contain only provisions specified in that section or terms incidental to and consistent with those specified provisions if necessary for their effectuation, and no others. Of even greater relevance is that part of Section 8c(5)(B) which makes payment of the uniform price "subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to [the] order, (b) the grade or quality of the milk delivered, [and] (c) the locations at which delivery of such milk is made. . . ." Congressional intent is clear that the only authorized departures from the uniform price are those enumerated in Section 8c(5)(B).

The Court therefore concludes that although the farm location differentials are not incompatible with the marketing concept underlying the uniform price principle, the Court cannot uphold their validity unless they fall within one of the specified permissible adjustments. But even if one of the enumerated adjustments does allow such differentials the Court can only affirm the differentials as contained in the Connecticut Order if the Secretary of Agriculture offered that specific adjustment as justification when he promulgated the Order. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-88 (1943).

2. *The Secretary's Justification*

The farm location differentials were contained in the Connecticut Milk Marketing Order when the Secretary of Agriculture first promulgated the order in 1959. 24 F.R. 1049 (1959). That promulgation and the Secretary's Final Decision issued in connection therewith were the result of extensive hearings held in 1958 in accordance with Sections 8c(3) and (4) of the Act, 7 U.S.C. §§ 608c (3) and

(4).[6] In his Final Decision, the Secretary set forth detailed findings with respect to the farm location differentials:

> "Provision should be made also for the payment of a market differential to producers in the nearby supply area. The monies for the payment of these differentials will be obtained by a deduction from the total value of all milk before completing the computation of the market-wide uniform price . . . .
>
> "Milk received from the nearby area has long represented the major part of the total Connecticut supply. The differentials adopted recognize the higher percentage of the milk near to the market than of milk in the more distant zones which customarily has been used for fluid purposes. Nearby producers have been able to obtain a price higher, in relation to more distant producers, than can be accounted for by the advantage in the cost of transportation to market. This historical pattern of pricing has been typical in the markets of this region, and market differentials of this type have been adopted in the nearby regulated

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[6] Section 8c(3) provides:

> "Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order."

Section 8c(4) provides:

> "After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity."

markets. The differentials adopted will reflect more representative values with respect to the milk of both nearby and distant producers since the nearby producer will share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling.

"In addition, the use of a nearby differential will assist in providing appropriate price alignments for direct delivery producers which will permit Connecticut handlers to continue to compete in the purchase of milk on reasonable terms with dealers in adjacent markets. The amounts of such differentials are very similar to those employed in other New England Federal order markets and are in reasonable alignment with the schedule employed in the New York-New Jersey market. Such differentials were proposed and generally supported by both producers and handlers at the hearing. Their employment will tend to promote orderly marketing in the milkshed." 24 F.R. 1049, 1063 (1959).

These findings were reaffirmed by the Secretary in 1960 after lengthy hearings on the New England orders. 25 F.R. 7819, 7833-34 (1960). Most recently in 1964, after further hearings, the Secretary again ruled in favor of continuation of the differentials.

"4. *Farm location differentials.* The farm location differential provisions under the present New England orders should be continued under the Massachusetts-Rhode Island order and the Connecticut order . . . .

"Such farm location differentials have been in effect under the several New England orders since the inception of the orders. The differentials were adopted to reflect in the pricing structure of the orders historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally re-

flected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of milk produced in the more distant areas of the milkshed." 29 F.R. 11205, 11213 (1964).

The findings quoted above indicate that the Secretary considered the Connecticut farm location differentials to be "adjustments for (a) . . . market . . . differentials customarily applied by the handlers . . ." as provided in Section 8c(5)(B) of the Act. For example, at the very outset of the discussion of farm location differentials in the 1959 Final Decision, the Secretary refers to the need for the payment of a "market differential." He then discusses the differential in terms of past practice and as a "historical pattern of pricing . . . typical in the markets of this region" and point out that "market differentials of this type have been adopted in the nearby regulated markets." The Secretary's later Final Decisions contain similar references.

Plaintiffs, however, ignore this language and stress the statement by the Secretary that the differentials will permit the nearby producer to "share in the higher-priced Class I market to an extent somewhat greater than otherwise would be the case under market-wide pooling." 24 F.R. 1049, 1063 (1959). Plaintiffs argue that this is an admission that the differentials are in fact based on the utilization of milk. As previously stated, however, the differentials are paid on the basis of farm location. The use made of the milk by the handler is totally irrelevant. The proper meaning to be accorded the Secretary's statement was explained at the trial by Mr. Herbert L. Forest, Director of the Dairy Division of the United States Department of Agriculture:

"A differential in an order for any purpose means that some farmer or some farmers who get the differential get a higher price, and the only way they can get

a higher price as compared with other farmers is to take it out of the higher utilization, because it is the class 1 higher value added to the pool which gives any basis for farmers getting a higher value. So that when one producer gets a differential as compared to another, in effect he is drawing out of this higher value which class 1 has put into it. Some other farmers get less. So when we talk about differentials, we usually say he gets a bigger cut of class 1 sales, because in effect that is what it means. That is the only place the differential can come from."

Furthermore, the Secretary's conclusion that the differentials would assist in providing proper price alignments so that Connecticut handlers could compete for milk supplies with handlers in adjacent markets, far from showing that the differentials are incompatible with the Act, indicates that they are vital to achieve orderly markets, an avowed objective of the Act.

Defendant-interveners suggest that farm location differentials can also be classified as production differentials or adjustments depending on the location of delivery of milk. While the Court recognizes that arguments along these lines might be made, no such findings were made by the Secretary in his Final Decisions. As the Secretary states in his brief in the instant action:

> "Either the farm location differential is a proper adjustment to the uniform price within the express provisions of 8c(5)(B)(ii), i.e. a 'market differential customarily applied', or it is not. That is the real question in issue. The Secretary's finding leaves no doubt as to his justification."

The Court must therefore confine itself to consideration of whether farm location differentials are in fact market differentials customarily applied by handlers.

3. *Legislative and Administrative History*

If the phrase "market . . . differentials customarily applied by the handlers" either clearly did or did not on its face encompass farm location differentials, the Court's task would be simple. The plaintiffs, on the one hand, contend that in view of Congressional concern over the delegation problem only the explicit use in the Act of the words "farm location differentials" could be taken as authorization of such differentials, and therefore the phrase relied on by the Secretary patently does not authorize these differentials. On the other hand, defendant-interveners argue that the statutory language plainly includes farm location differentials. The Court, however, disagrees with both of these claims. A desire to delineate and circumscribe an administrator's powers does not automatically result in or insure clear, precise and self-defining statutory language. When the language does not measure up to the ideal standard the courts would be doing a disservice to the legislative branch if instead of using available means at arriving at the true intent of Congress they refrained from giving the language any effect at all. A similar disservice would obtain if the courts went to the other extreme and held the language to include everything that any conceivable reading could find it to include. It is perfectly obvious to the Court that the term "market differentials" is sufficiently broad and indefinite when used in connection with marketing orders to encompass many types of differential; but by the same token this broadness does not necessarily mean that Congress intended it to have such a wide scope. The Court therefore finds entirely proper the suggestion of the Secretary that the Court resort to the usual aids to legislative interpretation in order to ascertain whether Congress intended farm location differentials to be encompassed by "market . . . differentials customarily applied by the handlers subject to such order."

Examination of the House of Representatives report, H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935), and the

similar Senate report, S. Rep. No. 1011, 74th Cong., 1st Sess. (1935), which accompanied the 1935 amendments to the Agricultural Adjustment Act of 1933, does not result in immediate clarification of the issue. On the one hand, the reports evidence a clear Congressional intent to affirm the varied marketing efforts and practices attempted by the cooperatives prior to the 1933 Act and continued pursuant to licenses issued under that Act and to encourage local variations in marketing plans.

> "The proposed amendments substitute the word 'order' for 'license' in order more accurately to describe the nature of the Secretary's regulatory power. The operations of cooperative marketing associations will be reenforced by the new sections of the bill dealing with these matters and these provisions will assure the cooperation of processors and distributors in programs intended to raise farm prices. The marketing agreements and licenses which have been issued and entered into pursuant to the Agricultural Adjustment Act have contained a great variety of provisions in order to adapt each particular program to the peculiar problems and circumstances presented in a given area by a particular commodity.
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> * * *
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> "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.
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> * * *

"Third. Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present section 8 (3) of the Agricultural Adjustment Act." H. R. Rep. No. 1241 at 7 and 9; see S. Rep. No. 1011 at 9.

On the other hand, the definitions of volume, production, and market differentials given in the reports would, if followed, make invalid many of the local adjustments and variations achieved by cooperatives and continued under the licenses.

"Minimum prices fixed in such orders are required to be uniform as to all handlers, subject to adjustments for differences in the grade and quality of the milk delivered, for differences in transportation costs from the place at which delivery is made to the handler to the distributing or processing plant, and for volume, market, and production differentials customarily applied by handlers. The volume differential is a differential which is paid when the operations of several country plants are consolidated into one plant. The inconvenience which is caused to producers by closing up plants to which they have been delivering and requiring that all of their milk be handled by one plant, is compensated by an additional payment to the producers. The production differential is the differential which is paid to a producer, compensating him for keeping his farm and milk qualified for a city market even though his milk may actually be going into manufactured use. It is necessary to keep this supply of reserve milk available for periods in which consumption of milk goes up so that the effect is that the producers must keep their farm in the same condi-

tion as if they were shipping milk into the city every day. The production differential is a payment to the farmer for performing this function in the market.

"The market differential is a differential which is given to the producer to compensate him for delivering his milk to a city market instead of to a country plant. These differentials vary with the markets and cannot be qualified as a 'location' differential, because of the fact that location is usually determined on the distance from a primary market whereas market differentials are usually paid in secondary markets." H.R. Rep. No. 1241 at 9-10; S. Rep. No. 1011.

At the trial, witnesses thoroughly familiar with milk marketing both prior to and after the enactment of the 1933 Act testified that these definitions not only excluded differentials in use under the licensing programs but that at least one of the definitions failed to describe any differential then in existence. Richard D. Aplin, who was Assistant Market Administrator under the first federal milk license for the Boston market beginning in 1933 and who is now Market Administrator under the Massachusetts-Rhode Island Order, testified that a volume differential as defined in the reports was paid only by the Dairymen's League Cooperative in New York in the late 1920's and early 1930's, but that a differential for large volume producers was common practice. Mr. Aplin further stated that he knew of no differential that fell within the definition of production differentials as provided in the reports although here again he knew of differentials in existence which could be called production differentials, as for example, payments for maintaining evenness of production throughout the year. With respect to market differentials, Mr. Aplin testified that while the definition given might apply to higher payments made at city plants, such payments, contrary to the reports, were made only in primary markets and not in secondary ones. He himself thought

that the farm location differentials, which he stated were customarily paid in New England, were really market differentials.

Donald Hammerberg, Market Administrator under the Connecticut Order, essentially affirmed Mr. Aplin's testimony although he was not familiar with the volume differential paid by the Dairymen's League and knew of no differentials which would in any way fit the definition of market differentials contained in the reports.

Two men who participated in drafting the 1935 amendments, Reuben Hall and Donald Kane, testified that the language with respect to volume, market and production differentials was not decided upon until the day before the legislation was introduced and that the problem had been to choose language specific enough to satisfy delegation requirements and yet broad enough to permit the Secretary to adapt the orders to meet varying conditions and to create stability. They stated that the language settled upon was purposely chosen for its breadth and it was definitely contemplated by the drafters that the words "market differentials customarily applied" should include farm location differentials.[7]

That Congress did not in fact intend to be restrictive in its authorization of differentials is most strikingly illustrated by a colloquy which took place on the Senate floor between Senator Copeland of New York and Senator Murphy, the floor manager of the bill, after issuance of the Committee reports. 74 Cong. Rec. 1139-1140 (1935). Senator Copeland first inquired about the effect of equalization on the supply of milk.

"Mr. Copeland. What has the Senator to say to the suggestion that in a number of communities in up-

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[7] Justice Frankfurter in his dissenting opinion in *Stark* v. *Wickard*, 321 U.S. 288, 315 (1944), noted that the Act was "devised by those who know the needs of the industry and drafted by legislative specialists. . . ."

State New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community."

Senator Murphy replied that Senator Copeland was generally correct.

"Mr. Murphy. If they were embrased in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses."

Senator Copeland, however, was not satisfied with this response.

"Mr. Copeland. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference in the cost of production. Taxes and values of property near the city are very much higher than in the case of property farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it."

The answer then given by Senator Murphy demonstrates that differentials, such as farm location differentials, were contemplated.

"Mr. Murphy. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

They adopt the present practice of business—

'(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.'" (emphasis added)

In view of these remarks by Senator Murphy, and in view of the testimony of two of the drafters of the statutory language in question, and considering the expressions of intent in the Committee reports that local variations and past practices under cooperative and licensing agreements should continue, the Court concludes that the narrow definition of market differentials contained in the committee reports must be read as illustrative rather than as restrictive.

At the trial much evidence was introduced by the Secretary and defendant-interveners as to differentials received in the 1920's and 1930's by milk producers whose farms were located in close proximity to the Boston market. While this evidence does not directly justify the inclusion of similar differentials in the Connecticut Order, it is relevant insofar as it establishes that payment of farm location differentials was in fact an approved "practice of business" at the time of the enactment of the 1935 amendments to the Agricultural Adjustment Act of 1933 and that such differentials were therefore contemplated by Congress.

Reuben Hall testified that beginning in the mid-1920's and continuing right up until the advent of federal licensing in 1933 it was the voluntarily agreed upon practice of handlers under contract with the New England Milk Producers Association to pay a premium to nearby farmers of about 46 cents per hundredweight which was derived from an amount otherwise payable to all producers. Sometimes this was achieved by what was called a preferential base rating plan which meant that a greater proportion of a nearby producer's milk was treated as being used as higher priced Class I or fluid milk. The premium was over and above any additional amounts paid to nearby producers by handlers because of savings in transporting the milk to market. It was simply part of a self-imposed self-regulating program designed to stabilize the market.

The first federal license under the Agricultural Adjustment Act was issued by the Secretary on October 30, 1933 and became effective on November 3, 1933. Under the license, a preferential base was used to maintain the approximately forty-six cent differential above transportation cost savings which had previously been paid to nearby farmers. Admittedly, under the language of the license the preferential base was granted to farmers who delivered their milk directly to the handlers' city plants. But, as a number of witnesses testified, only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. The others had to deliver to country stations and therefore did not receive the preferential base. The result was that the license in effect provided for a differential to producers with nearby farms. That those administering the license thought they were doing just this is evident from a pamphlet entitled "The Boston Milk License" issued August 1, 1934 by the Boston Market Administrator. Although the pamphlet was distributed in connection with a second Boston license which had replaced the first on March 16, 1934, the

pamphlet's author, who was in fact the witness Richard Aplin, was referring to the provisions of the first license and the conditions surrounding its issuance when he stated:

> "It was found that in past years the producers who were located near Boston had consistently received the fluid milk price for a larger proportion of their milk on account of their having been able to adjust their production more closely to the requirements of their distributors. A careful study by the Administrator, covering the eight-year period from 1926 to 1934, showed that the assignment of 85% bases to these producers would result in giving to them the same relative advantage that they have had during the past over producers who were located at a greater distance from the market. Consequently producers whose milk was delivered directly to a distributor's city plant within 35 miles of the State House in Boston were assigned base ratings equal to 85% of their average deliveries of milk in September, October and November, 1933, or 85% of their average daily deliveries of milk for the entire year 1933, whichever amount was greater in each case. A few groups of producers who were delivering milk to plants more than 35 miles, but less than 100 miles, from the State House at Boston, were given bases less than 85%, but more than 61% of their 1933 production."

Actually, the preferential treatment accorded nearby farmers was continued under the second license although that license left it to the Market Administrator to determine each individual farmer's base.

The second Boston license was declared invalid on May 17, 1935 by the United States District Court for the District of Massachusetts in *United States* v. *Seven Oaks Dairy Co.*, 10 F. Supp. 995 (D. Mass. 1935). The license however remained on the books until February 9, 1936

when it was replaced by the first order under the 1935 amendments to the Agricultural Adjustment Act of 1933. Under the order there were no preferential bases as such —all farmers' bases were determined by the same formula —but those producers whose farms were within forty miles of the State House in Boston and who delivered to a plant within forty miles of the State House received a higher price for all their base milk than those farmers delivering to a plant within forty miles of the State House but whose farms were located more than forty miles away. Thus, this differential was unquestionably based solely on the location of a producer's farm.

The first Boston order was suspended by the Secretary on July 31, 1936 when the District Court for the District of Massachusetts held the Agricultural Adjustment Act unconstitutional in *United States* v. *David Buttrick Co.*, 15 F. Supp. 655 (D. Mass. 1936), *rev'd*, 91 F.2d 66 (1 Cir. 1937). After the passage of the Agricultural Marketing Agreement Act on June 3, 1937, the Secretary reinstated the order in part effective July 1, 1937. The order was then amended and as amended became fully effective on August 1, 1937. 2 F.R. 1588 (1937). The amended order eliminated base ratings entirely and simply provided for the payment of a forty-six cent differential to producers with farms located near the State House, and a twenty-three cent differential to producers with farms situated at an intermediate distance. 2 F.R. 1588, 1590 (1937). This provision in essence remained in effect in all orders regulating the Boston market until it was declared invalid in *Allen* v. *Freeman*, Civil Action 3379-66 (D.D.C., June 15, 1967), appeal pending. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967). The farm location differentials contained in the Connecticut Marketing Order are the equivalent of the Boston differentials.

This fundamental continuity in the use of farm location differentials beginning in a period of attempted self-

regulation and progressing through various stages of government regulation clearly suggests that Congress recognized the need for such differentials and intended to authorize them.

Certainly those people in the industry and government most intimately involved in drafting the regulatory language and in administering the resulting legislation believed that Congress intended to authorize farm location differentials, and they continue to believe so. Their opinions cannot be ignored. As the Supreme Court stated in *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 549 (1940):

> "In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'"

See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co.* v. *International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Indeed, such deference is to be accorded administrative interpretation of statutory language that to sustain such an interpretation, the Court "need not find that [the administrative] construction is the only reasonable one, or even that it is the result [the Court] would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n of Alaska* v. *Aragon*, 329 U.S. 143, 153 (1946). See also, *e.g.*, *Udall* v. *Tallman*, *supra* at 16.

Congressional reenactment of the 1935 amendments to the Agricultural Adjustment Act of 1933 in the Agricultural

Marketing Agreement Act of 1937 is, of course, an indication that Congress approved the use of farm location differentials since the 1936 Boston order issued under those amendments contained such differentials. In *Queensboro Farms Products* v. *Wickard*, 137 F.2d 969 (2 Cir. 1943), an attack on a provision of the milk order regulating the New York metropolitan milk market placed in question the meaning of the phrase "use classification" in Section 8c(5)(A) of the Act. Judge Frank upheld the Secretary's interpretation of the language of the Act and in so doing alluded to the significance of the 1937 reenactment of the 1935 amendments:

> "After the Act was amended in 1935, the Secretary issued several regional milk orders. In some of them, he adopted as a measure of 'use,' and as a basis for classification, the form in which milk was sold by, or moved from, the plants of, handlers. While those orders were in effect, Congress (because of the decision in *United States* v. *Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 477, 102 A.L.R. 914, holding certain aspects of the Act unconstitutional) after reconsidering inter alia, the provisions which had been added in 1935 and pursuant to which these orders had been made, re-enacted those 1935 provisions with amendments not here pertinent. It is true, of course, that bald re-enactment of statutory provisions, without more, need not be given much weight as indicating an adoption of preceding administrative interpretation; but where careful consideration has—as in the case of the statute before us—been given by Congress in connection with a re-enactment, much is to be said for a contention that Congress intended to adopt the intervening administrative interpretation." (Footnotes omitted) *Id.* at 976-77.

Judge Frank's conclusion is equally applicable here.

Furthermore, the 1937 reenactment goes a step beyond implicit approval of the differentials. Section 4 of the Act, 50 Stat. 249, provides:

> "Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, r order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed."

What otherwise might be a meritorious argument that Congress simply intended to prevent technical abatement of prior orders is countered by the House of Representatives committee report accompanying the proposed legislation.

> "Section 4 of the bill negatives any implication that its effect is to invalidate or cast doubt on action heretofore taken under the agreements and orders provisions. The section also expressly ratifies, legalizes, and confirms such action. Judicial sanction for such a provision is found in *Mattingly* v. *District of Columbia* ((1878), 97 U.S. 687, 690); *United States* v. *Heinzen* ((1907), 206 U.S. 370, 382); *Tiaco* v. *Forbes* ((1913), 228 U.S. 549, 556); *Rafferty* v. *Smith, Bell & Co.* ((1921), 257 U.S. 226, 232); *Isbrandtsen-Moller Company, Inc.* v. *United States et al.* (No. 307, October term, 1936, United States Supreme Court, decided Feb. 1, 1937); and *Swayne & Hoyt, Ltd., et al.* v. *United States* (No. 494, October term, 1936, United States Supreme Court, decided Mar. 1, 1937)." H. Rep. No. 468, 75th Cong., 1st Sess. 4 (1937).

The first sentence makes it clear that Congress indeed wished to avoid technical abatements, but the second sentence by use of the word "also" demonstrates that Section 4 was further designed to ratify, legalize and confirm affirmatively the provisions of past orders. In addition, the cases cited in the report all involved instances in which Congress had legalized or ratified prior executive action; none of them were concerned with mere technical abatement.[8]

Finally, it is important to note that in all the years since passage of the 1935 amendments and the 1937 Act farm location differentials have been used in a number of marketing orders by the Secretary, and Congress has taken no action to put an end to the practice. *Cf. Udall* v. *Tallman, supra,* at 408-09.

This history of reenactment, confirmation, and acquiescence does not directly establish that farm location

[8] In *Brannan* v. *Stark*, 342 U.S. 451, 465-66 (1952), the Supreme Court was presented with the argument that Section 4 of the Act validated all provisions in future orders which were similar to provisions in orders existing at the time of passage of the 1937 Act. The Supreme Court in holding that a particular type of payment to cooperatives was unauthorized by the Act stated that "[e]ven if we were to accept the proposition that Congress there intended to confer statutory authority for all future provisions like any of those then existing in any marketing order, we would reach the same conclusion because neither the provisions for these particular payments nor any closely analogous provisions were at that time present in any marketing orders." The situation is different here where the equivalent of farm location differentials were contained in an order in effect when the 1937 Act was passed. Furthermore, this Court in no way accepts the proposition that Section 4 automatically validates the inclusion of farm location differentials in any order. The Court simply is of the opinion that Section 4 represents Congressional reiteration of its intent to authorize the inclusion of farm location differentials in orders governing marketing areas where such differentials have customarily been paid.

differentials as contained in the Connecticut Order are a proper exercise of administrative power. That depends in part upon whether there is substantial evidence in the record to support the Secretary's findings. The history does, however, lend great weight to the conclusion that farm location differentials as a general proposition are authorized by the Act and approved by Congress for use in marketing areas where they have been historically paid by handlers and their continued payment will tend to effectuate the purposes of the Act.

4. *Not a Trade Barrier*

Plaintiffs further contend that farm location differentials constitute a trade barrier in violation of Section 8c(5)(G) of the Act, 7 U.S.C. §608c(5)(G). That section provides that milk marketing orders shall not "prohibit or in any way limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Plaintiffs' argument is without merit. The record is devoid of evidence showing that payment of the differential in any way prohibits or limits the flow of milk or its products into or within the Connecticut market. See *Freeman* v. *Lewes Dairy, Inc.*, 337 F.2d 827 (3 Cir. 1964), *cert. denied*, 379 U.S. 1000 (1965); *cf. Lewes Dairy, Inc.* v. *Freeman*, 260 F. Supp. 921 (D.Del. 1966, appeal pending In fact plaintiffs admitted at trial that they had switched from shipping into other markets to ship into Connecticut because they obtained a better price for their milk under the Connecticut Order.

It must also be noted that farms receiving the benefit of the differential are not limited to Connecticut farms but include farms in Rhode Island and neighboring portions of New York and Massachusetts—areas from which milk can be directly shipped to market in Connecticut. Thus, the

differential is clearly not designed to limit the flow of out-of-state milk.

Furthermore, even if the payment of the differential could in some potential way limit the flow of milk, Section 8c(5)(G) was not designed to prevent such limitations where they result from the exercise of express authority in Sections 8c(5)(A) and (B) to classify, price and pool milk and to make adjustments. Apparently Section 8c(5)(G) originated in the House of Representatives as an amendment to the bill. As first introduced by Congressman Andresen it simply provided that no marketing order shall "prohibit" the marketing in that area of any "milk or milk product" produced in any area of the United States. 79 Cong. Rec. 9572 (1935). Congressman Southoff then suggested that the provision be strengthened by substituting the words "limit or tend to limit" for the word "prohibit." *Id.* Congressman Jones, the floor manager of the bill, immediately pointed out that if the words "limit or tend to limit" were substituted, it "would absolutely wreck the whole milk program." He then offered an explanation for his position:

> "In order to get away from the terrific conditions that have prevailed in the milk industry there is provided in the bill authority to fix a minimum price to producers. That, at least in a measure, would limit or tend to limit shipment, and yet the gentleman, I am sure, does not want to interfere with the price to producers. Then it is a universal custom in the marketing of milk to classify milk. This, in a way, is a limitation.
>
> "I am perfectly willing to adopt the first amendment suggested, because that simply treats all areas alike, for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area; but if you said that no restrictions or limitations could be required, it would wreck the program, it would destroy every vestige of a program we have for milk."

The result was that the finally chosen wording of Section 8c(5)(G) carefully avoided the problem alluded to by Congressman Jones. This is made quite clear in the conference report accompanying the proposed legislation:

> "Amendment no. 24: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States. The Senate amendment extended this provision so that no marketing agreement or order so applicable could limit in any manner the marketing in the marketing area of milk or its products produced anywhere except that certain limitations on the marketing of milk were specifically permitted. The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. *The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc.*" H. R. Rep. No. 1757, 74th Cong., 1st Sess. 21 (1935) (emphasis added)

Thus farm location differentials, permitted as they are as market differentials, are not prohibited by Section 8c(5)(G).

Lehigh Valley Cooperative Farmers, Inc. v. *United States*, 370 U.S. 76 (1962), is not authority to the contrary. In that case the Supreme Court held invalid as a trade barrier in violation of Section 8c(5)(G) a provision in the New York-New Jersey Order which required special payments to be made on certain otherwise unregulated milk shipped

into the marketing area. The Supreme Court found that this requirement in effect precluded or severely curtailed the shipment of such milk into the market. *Id.* at 86-87. Just as importantly, the only authorization offered by the Secretary for the requirement was Section 8c(7)(D) of the Act, 7 U.S.C. §608c(7)(D), which permits the Secretary to include terms in Orders which are incidental to the provisions specified in Section 8c(5) of the Act only if those terms are not inconsistent with those provisions and are necessary to effectuate them. The Supreme Court concluded that since the requirement was inconsistent with Section 8c(5)(G) it could not be justified by Section 8c(7)(D). *Id.* at 98. In the present case the differentials do not exclude milk from the area nor does the Secretary attempt to justify them as being incidental to other authorized provisions.

5. *Judicial Interpretation*

The validity of farm location differentials was passed upon and approved by the courts shortly after the passage of the 1937 Act. Numerous handlers in the Boston area refused to comply with the Greater Boston Milk Marketing Order when it became effective in its amended form on August 1, 1937. In response, the government sought and obtained temporary injunctions against the handlers in the District Court. *United States* v. *Whiting Milk Co.,* 21 F. Supp. 321 (D. Mass. 1937); *United States* v. *H. P. Hood & Sons, Inc.,* 26 F. Supp. 672 (D. Mass. 1939). These cases after being docketed on appeal in the Circuit Court of Appeals for the First Circuit went directly to the Supreme Court on certiorari where they were considered along with cases challenging the validity of the milk marketing order regulating the handling of milk in the New York metropolitan area. The result was that the Supreme Court handed down two opinions. In the first, *United States* v. *Rock Royal Co-operative, Inc.,* 307 U.S. 533 (1939), the Supreme Court considered extensive attacks on the constitutionality of the 1937 Act and the validity of the New

York Milk Marketing Order and upheld both the Act and the Order. In the second, *H. P. Hood & Sons, Inc.* v. *United States,* 307 U.S. 588 (1939), the Supreme Court sustained the Boston Order.

The New York Order considered in *Rock Royal* contained provisions for the payment of a twenty-five cent differential to farmers delivering their milk to handlers' plants located in eighteen counties near New York City. While five cents of the differential was paid out of the handlers' own pockets, the other twenty cents was obtained by deducting that amount from the price which otherwise would be paid to all farmers, the method employed by the Connecticut farm location differentials. Furthermore, as was pointed out in connection with a similarly worded differential in the first Boston license of 1933, delivery to plants in those counties meant that the farms from which the deliveries were made were located there. In fact those persons involved with the differential always spoke of it as a differential paid on the basis of farm location. Thus, the District Court in the *Rock Royal* case in discussing the differential stated:

> "[The handlers] are also required to pay into the Producers Settlement Fund to provide preferential payments made to producers living in 18 counties, under the provisions of Article 6, Section 8. The producers in those counties receive 20 cents per cwt. in addition to the locational differentials, which return them a higher price for their milk because they are located nearer New York." 26 F. Supp. 534, 555 (N.D.N.Y. 1939).

The District Court held the differential invalid and refused enforcement of the Order on this and other grounds. On appeal to the Supreme Court the government defended the differential as one based on farm location:

> "There was ample evidence before the Secretary to justify the reasonableness of the nearby differentials.

> The 18 counties to which the nearby differentials apply are all very close to the marketing area and are separated from the rest of the milkshed by non-productive mountainous territory * * *. The milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages. Accordingly, it was reasonable that these producers should receive a special differential." Brief for the United States, Oct. Term, 1938, No. 771, at 60-61.

The appellee, on the other hand, argued as plaintiffs do in the instant action that the differential was "neither contemplated nor authorized by the Act", was "repugnant to 'equalization', which the statute sought to accomplish" and was the "basis of inequality". Brief for Rock Royal Co-operative, Oct. Term, 1938, No. 777, at 76.

The Supreme Court in reversing the District Court held that "[t]he Act authorizes such an arrangement", citing Section 8c(5)(A). 307 U.S. at 567.

It is true that *Rock Royal* was a suit involving handlers and not producers and that Section 8c(5)(A) applies to the former rather than the latter. But Section 8c(5)(A) provides for the same uniform prices subject to the same adjustments as set out in identical language in Section 8c(5)(B) applying to producers. Therefore, the Supreme Court's holding that Section 8c(5)(A) "authorizes such an arrangement" is most certainly authority that Section 8c(5)(B) authorizes the same arrangement.

It is also true that the Supreme Court refrained from considering the District Court's finding that the differential was discriminatory as to producers since only handlers were involved in the action. The Supreme Court did, however, reject contentions of discrimination against handlers

made by appellees because they were "fanciful and remote" and "would not justify a court in overturning the Secretary's determination of the propriety of the differentials on evidence found by the lower court to be substantial." 307 U.S. at 567. The Supreme Court further concluded that "[s]uch an administrative determination carries a presumption of the existence of a state of facts justifying the action far too strong to be overturned by such suggestions as are made here." 307 U.S. at 567-68.

While generally upholding the validity of the Boston Milk Marketing Order in *H. P. Hood & Sons, Inc.* v. *United States, supra,* the Supreme Court omitted any specific discussion of the farm location differentials contained in the Order. These differentials had been challenged in the lower court but the challenge apparently was not pressed on review by the high court. See *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342, 344 (1 Cir. 1939). The Supreme Court did, however, note that pursuant to the Order, adjustments were made for differentials. 307 U.S. at 594. In view of this and the Court's simultaneous decision in *Rock Royal* it may be assumed that the Court was not struck by any essential distinction between the differentials in *H. P. Hood & Sons* and the differential it upheld in *Rock Royal.*

If there is any doubt as to whether the Supreme Court gave full consideration to the validity of farm location differentials, there can be no doubt that the differentials received such consideration by the Court of Appeals for the First Circuit. Approximately six months after the Supreme Court rendered its decisions in *H. P. Hood & Sons* and *Rock Royal,* the Court of Appeals for the First Circuit decided *Green Valley Creamery, Inc.* v. *United States,* 108 F.2d 342 (1 Cir. 1939). In that opinion the court first noted that because of the prior Supreme Court decisions appellants, who were milk handlers, were no longer free to question the constitutionality of the Act nor the validity of most of the terms of the Boston Order.

The court, however, did permit them to challenge three provisions of the Boston Order because attacks on these provisions had not been pressed before the Supreme Court. One of these provisions established the farm location differentials and another specified two sets of minimum prices, the higher applicable to milk purchased from associations of producers, and the lower applicable to milk purchased directly from individual producers.

The court found that the two sets of minimum prices were justified as "a market differential customarily applied by handlers." *Id.* at 345. The court held that the evidence before the Secretary supported a finding that a higher price had customarily been paid in the market area to producers associations because such milk had "an enhanced value" due to the fact that many marketing services had already been performed by the associations. The court further held that "[t]he phrase 'market differential', undefined as it is in the Act, is reasonably susceptible of such an interpretation." *Id.* Thus the court rejected the narrow definition of "market differential" suggested by some of the language in the Senate and House Committee reports and argued here by plaintiffs.[9] As a further ground for its decision the court noted that the provision existed in the Boston Order prior to the 1937 Congressional re-

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[9] The Supreme Court apparently approves of the First Circuit's view of the proper scope to be accorded the term "market differential". In *Brannan* v. *Stark*, 342 U.S. 451, 466 (1952), the Supreme Court found a certain type of payment to producers' associations unauthorized by any provision of the Act but stated that:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and non-cooperative milk was upheld in *Green Valley Creamery* v. *United States*, as a 'market differential' authorized by § 8c (5)(A)(1)." (footnote omitted)

enactment without change of the 1935 amendments to the Agricultural Adjustment Act of 1933.

In considering the farm location differentials, the court placed heavy emphasis on the fact that such differentials had been paid historically.

> "There was evidence before the Secretary to the effect that similar differentials in favor of nearby farms had existed in the Boston market for many years. Various factors were mentioned as accounting for this, including their greater accessibility to the market, and their greater dependability as sources of supply, because, as experience showed, the nearby farms had a more uniform level of production throughout the year. These producers were also potential dealers, who might establish their own milk routes in competition with handlers in the Boston market, if prices were not acceptable. Whatever the explanation, this group of producers in fact commanded somewhat more favorable prices for their fluid milk as against producers more remotely located. The differentials now objected to were inserted in the Order so as not to disturb the status quo in this respect." *Id.* at 346.

The court recognized that "[m]ilk entering the Boston market from nearby farms is presumably delivered to handlers at points nearby the market", and therefore the differentials could be authorized pursuant to Section 8c(5)(B)(ii) of the Act as differentials based upon "the locations at which delivery of such milk is made." *Id.* But the court found it unnecessary to further develop this point because it concluded that

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but

they are also customary market differentials based upon the location of farms nearby the market." *Id.*

The court also observed that the farm location differentials were part of the Boston order at the time of the 1937 reenactment of the 1935 amendments to the Agricultural Adjustment Act of 1933.

Thus the Court of Appeals clearly found, as the Secretary contends here, that farm location differentials are market differentials authorized by the Act where such differentials customarily have been paid. It was only after the Court had set this out that it noted that handlers lacked standing to raise the issue because the differentials affected only producers. This Court is of the opinion that the Court of Appeals' final point in no way weakens the authority of its prior conclusions concerning the validity of the differentials and that these conclusions should be afforded great weight coming as they did such a short time after the enactment of the legislation in question. Certainly a court sitting contemporaneously with a legislature is in a better position to ascertain the true intent of that legislature than a court sitting some thirty years later.

Plaintiffs place great reliance on the recent decisions of *Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966), and *Allen* v. *Freeman*, Civil Action 3379-66 (D.D.C., June 15, 1967), appeal pending. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967).

In *Blair*, the Court of Appeals for the District of Columbia Circuit held invalid the farm location differentials then contained in the New York-New Jersey Milk Marketing Order, 7 C.F.R. 1002 (1968). Certain factual differences exist between the circumstances found by the court in *Blair* and the circumstances in the instant case. For example, the differentials in the New York-New Jersey Order varied in amount according to the total utilization of fluid milk in the market, a factor which bore heavily

on the Court of Appeals conclusion that the differentials represented impermissible variations in price based on the use of milk. The Connecticut differentials, however, remain constant in amount. Another example is that the Secretary attempted to justify the New York-New Jersey differentials as "adjustments for the locations at which delivery of such milk is made." No such attempt is made here by the Secretary. Instead the Secretary squarely places his reliance on "market differentials customarily applied by the handlers."

Despite the differences in fact, the Court recognizes that its holding is based on conclusions which are contrary to those reached in *Blair*. The Court is indeed reluctant to disagree with such a distinguished court as the Court of Appeals for the District of Columbia and does so only with the greatest respect and deference. But while the Court concurs with the Court of Appeals for the District of Columbia that the uniform price requirement was designed to eliminate ruinous competition for the fluid milk market, it cannot concur in the Court of Appeals conclusion that the requirement prohibits recognition of the historic fact that farmers located in particular areas near the market were accorded a greater share of that market. Similarly, the Court agrees with the Court of Appeals that Congress was concerned in 1935 with the delegation problem and attempted to make the provisions of the Act specific. But the fact remains, as noted in *Green Valley Creamery, Inc.* v. *United States, supra,* at 345, that the phrase "market differential" remains undefined in the Act. And while the court in *Blair*, at 238, concluded that "[t]he 'market differential' rationale is plainly not a tenable basis for the nearby differential" because "it is plain that this type of allowance turns not on the location of the producer's farms but on the nature of the market to which they deliver their milk," the court in *Green Valley Creamery,* just several years after the provision's enactment, found the op-

posite.[10] Therefore faced with conflicting authority and an action involving an independent order and separate differentials, the Court believes it is justified, for the reasons it has previously attempted to develop, in holding that farm location differentials are authorized by the Act as market differentials.

The plaintiffs in *Allen* v. *Freeman, supra,* attacked the farm location differentials contained in the Massachusetts-Rhode Island Milk Marketing Order, 7 C.F.R. 1001 (1968). The District Court for the District of Columbia granted plaintiffs' motion for summary judgment without opinion on the basis of the *Blair* decision, and that judgment is currently on appeal to the Court of Appeals for the District of Columbia. As to this decision nothing need be added to what has already been said with respect to the decision in *Blair.*

Claim of Unconstitutional Discrimination

Another claim made by plaintiffs is that the Connecticut farm location differentials are unconstitutionally discriminatory because they result in certain farmers receiving more for their milk than others. If the differentials were paid without reference to any rational basis this claim would be correct. But the Act only authorizes such differentials if they have been customarily paid, and customary payment is alone a sufficient rationale for continued payment under a scheme of regulation. *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 616-18 (1950). Therefore, a critical question with respect to both the authorization of the Connecticut farm location differentials and the issue of discrimination is whether the evidence before the

[10] If the *Blair* court's definition of market differentials were followed, it would necessarily mean that the double set of minimum prices upheld in *Green Valley Creamery* and cited with approval by the Supreme Court in *Brannan* v. *Stark,* 342 U.S. 451 (1952), would also be invalid. See supra note 9.

Secretary supported the Secretary's findings that the differentials were customarily paid in the Connecticut area and that their continued payment would tend to effectuate the policies of the Act.

Claim of Insubstantial Evidence

After an extensive review of the voluminous record of the administrative hearings held in connection with the promulgation of the Connecticut Milk Marketing Order, the Court is of the opinion that the evidence before the Secretary in support of his findings that farm location differentials were customarily paid in the Connecticut area and that their continued payment would tend to effectuate the policies of the Act was substantial and fully justified those findings.

In 1958 a proposed federal milk marketing order for the Connecticut market was considered in hearings held at Hartford, Connecticut. The proposed order included a farm location differentials provision. Dr. C. W. Swonger, an economist for the New England Milk Producers' Association testified at length concerning the differentials—their basis and the need for them. Hearing Record, 1958 Basic Connecticut Promulgation Proceeding 1261-1269 (hereafter 1958 H.R.). He demonstrated how "producers located near the market have been able to obtain prices for their milk higher than could be explained solely on the basis of handling and transportation costs." 1958 H.R. 1267. With specific reference to the Connecticut market Dr. Swonger stated that

> "[d]espite the competition of unregulated milk, and the lack of any control over prices paid for such milk, nearby producers in Connecticut have continued to receive blended prices higher than those paid to nearby producers in Boston, and from 1 to 2 cents per quart higher than the freight and handling costs reflected in the Class I and blend price differentials." 1958 H.R. 1264-1265.

The reasons that these differentials existed, according to Dr. Swonger, were the availability of alternative marketing opportunities to nearby producers, greater evenness of production in the nearby area, historical pricing patterns, and the need for alignment with the various neighboring, competing New England and Middle Atlantic markets. 1958 H.R. 1962-1965. In addition, as pointed out by George C. Dudley, a dairy farmer and chairman of the dairy commodity committee of the Connecticut Farm Bureau Association, Connecticut farmers had higher taxes and other costs. 1958 H.R. 554.

After presenting a number of exhibits showing the historic price differential paid in the Connecticut market, Dr. Swonger stated:

> "These exhibits bear out the fact that producers located near the market have been able to obtain prices for their milk higher than could be explained solely on the basis of handling and transportation costs. The differentials have probably been wider than can be maintained under present marketing conditions. There may be groups in Northern New England or New York who will argue for 'no differential', in excess of handling and transportation costs, and other groups in southern New England who will argue that the differentials have not been high enough. We say merely that a substantial differential has existed, and that this fact has to be recognized under any federal order." 1958 H.R. 1267-1268.

It is relevant in considering Dr. Swonger's testimony that he did not simply propose farm location differentials in isolation but as part of an integral plan designed to achieve equitable results for all producers.

Dr. Swonger did not feel qualified to testify with respect to the "specific definition of the differential areas." As he stated:

> "Such testimony must come from those in Connecticut who are more familiar with the nearby supply area

> and the relative prices paid to producers. The definition of the differential areas depends not on political boundaries, but on the competitive pressure of other markets seeking milk in the same area. In general, the boundaries should be drawn in such a way as to affect the fewest number of neighboring producers, in much the same way as the boundaries of a marketing area are defined to 'minimize competition' between regulated and unregulated handlers." 1958 H.R. 1268-1269.

Testimony as to what the specific differential areas should be was, however, provided by Fred S. Raymond, Director of the Cooperative Dairy Economic Service (1958 H.R. 623-632), Kenneth E. Geyer, General Manager of the Connecticut Milk Producers Association, and others. Mr. Geyer testified that "the Hudson River and the Massachusetts Turnpike and its New York extension" would be proper boundaries "closely conform[ing] to the Connecticut direct delivery milkshed area." 1958 H.R. 1312. The direct delivery milkshed area is that area from which milk is delivered directly to Connecticut handlers rather than to plants outside of the state from where the milk must be transshipped. Not only Mr. Geyer but the other witnesses analyzed the differential in terms of nearby direct delivery areas.

The Secretary's 1959 Final Decision affirmed the need for farm location differentials on the basis of the prior hearing, making certain changes in the areas covered by the proposed differentials so that they would conform to what had been suggested by the witnesses. 24 F.R. 1049, 1063 (1959). The differentials as modified were included in the first federal Connecticut order promulgated at the time of this Final Decision. The differentials were reviewed at hearings held in 1959 and 1963 and reaffirmed in 1960 and 1964 on the original basis.

The Court is completely satisfied that the Secretary's finding that the differentials were customarily paid is

supported by substantial evidence. Therefore, the differentials are authorized by the Act as market differentials customarily paid and are not unconstitutionally discriminatory. Furthermore, substantial evidence supports the Secretary's findings that the employment of the differentials "will tend to promote orderly marketing in the milkshed." *Id.* The differentials are therefore a valid provision of the Connecticut order. Section 8c(4) of the Act.

Conclusion

The Court concludes that this action presents a justiciable controversy over which the Court has jurisdiction. Plaintiffs and defendant-interveners are properly representative of the classes of dairy farmers previously designated by the Court.

The Court further concludes that the farm location differentials in the Connecticut Milk Marketing Order, 7 C.F.R. § 1015.72 (1968), are authorized by Section 8c(5)(B) of the Agricultural Adjustment Act of 1937, 7 U.S.C. § 608c(5)(B), and are otherwise legal and completely valid provisions of that Order. Therefore the Court denies a permanent injunction enjoining the Secretary of Agriculture from continuing the differentials and directs that judgment be entered in favor of defendant and defendant-interveners.

This Memorandum of Decision together with separately stated Findings of Fact and Conclusions of Law constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

Plaintiffs' motions to strike evidence, including renewal of motions made at the trial and motions which they were granted leave to file subsequent to trial have been carefully considered. The Court denies the motions insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law made herein pursuant to Rule 52, Fed. R. Civ. P.; in all other respects the motions are dismissed as moot.

Since this is a class action and judgment will therefore bind all members of plaintiffs' class, the Court deems it advisable to direct the Clerk to delay entry of judgment in favor of defendant and defendant-interveners for a period of fifteen days and to direct that within that period plaintiffs' counsel shall mail to all members of plaintiffs' class notice of this Court's decision together with an explanation of the effect thereof and a statement as to whether plaintiffs intend to prosecute an appeal. If plaintiffs do not intend to prosecute an appeal, notice must be given of the means by which members of the class may seek leave to file such an appeal and the time limit involved.

Furthermore, because this is an action for an injunction, entry of judgment will automatically and immediately terminate the preliminary injunction granted by order of this Court, Foley, C.J., on March 9, 1967, unless the Court directs otherwise. Rule 62(a), Fed. R. Civ. P. Therefore, in order to fully protect the rights of all parties and to maintain the status quo to permit an appeal, the Court orders that the injunction granted on March 9, 1967 shall continue in force until entry of judgment and thereafter for a period of sixty days upon such terms and conditions as contained in the order of March 9, 1967, unless otherwise directed by the Court. If within sixty days a notice of appeal is filed, the injunction shall continue in force during the pendency of the appeal unless dissolved or modified by the appropriate court.

ORDER

ORDERED as follows:

(1) That the Court's orders of October 20, 1967 with respect to maintenance of this action as a class action by plaintiffs and defendant-interveners are affirmed in all respects except that Roy E. Ottman and George Mesick, Jr. are eliminated as named plaintiffs.

(2) That all motions to strike evidence, insofar as they are directed at evidence which supports the Court's findings of fact and conclusions of law herein pursuant to Rule 52, Fed. R. Civ. P., are denied; in all other respects the motions to strike evidence are dismissed as moot.

(3) That upon the expiration of fifteen days the Clerk shall enter final judgment in favor of defendant and defendant-interveners dismissing plaintiffs' complaint with costs.

(4) That plaintiffs' counsel within fifteen days shall mail to each member of plaintiffs' class a notice of this Court's decision herein together with an explanation thereof and with a statement as to whether plaintiffs will prosecute an appeal. In the event that plaintiffs do not intend to appeal, notice must also be given as to the means by which members of plaintiffs' class may seek leave to file such an appeal and the time limit involved.

(5) That the injunction granted pursuant to an order of this Court dated March 9, 1967 shall continue in effect until entry of judgment and thereafter for a period of sixty days under such terms and conditions as contained in the Court's order of March 9, 1968, unless the Court directs otherwise.

(6) That if a notice of appeal is filed in this action within sixty days after entry of judgment the injunction granted on March 9, 1967 shall continue thereafter during the pendency of the appeal subject to dissolution or modification at any time by the appropriate court.

Dated at Albany, New York, this 2nd day of August, 1968.

WM. H. TIMBERS
William H. Timbers
United States District Judge
Sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 67-CV-38

HAROLD R. CRANSTON, DALE R. FRENCH, HELMER A. CARLSON and DAVID B. PHILLIPS, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Plaintiffs*,

v.

ORVILLE L. FREEMAN, Secretary of Agriculture of the United States, *Defendant*,

and

ALBERT GUILIAN, GROVER C. ATWOOD, and A. J. MALNATI, Individually and on Behalf of all Other Persons in their Class who are Similarly Situated and Affected, *Defendant-Interveners*.

Findings of Fact and Conclusions of Law

The Court, after full hearing, makes the following Findings of Fact and Conclusions of Law which, together with the Court's Memorandum of Decision filed herein, constitute the Court's findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P.

FINDINGS OF FACT

1. Plaintiffs are four dairy farmers (milk producers) located in New York State. They bring this action individually, and as representatives of the class of approximately 250 milk producers who do not receive "farm location differentials" pursuant to Section 1015.72(a) of the Order regulating the handling of milk in the Connecticut Milk Marketing Area, 7 C.F.R. § 1015 (1968).

2. Three other dairy farmers located in Connecticut and Massachusetts were permitted to intervene as defendants on behalf of themselves as individuals, and as representa-

tives of the class of approximately 3000 milk producers receiving farm location differentials pursuant to Section 1015.72(a) of the Connecticut Marketing Order.

3. Plaintiff Cranston has for eight years been opposed to the Connecticut Farm Location Differentials. In 1966 Cranston discussed with his long-time friend and neighbor, attorney John P. Weatherwax, the possibility of bringing legal proceedings challenging the differentials. On January 27, 1967, after Cranston, French and Carlson had definitely decided to commence an action, Cranston was informed by the Consolidated Milk Producers' Association (CMPA), formerly Connecticut Milk Producers' Association, that CMPA would reimburse members for reasonable expenses incurred in maintaining or defending an action involving the validity of the farm location differentials. CMPA, a democratic organization, was motivated by the fact that its members included both those who did, and those who did not, receive the differentials and by the fact that great uncertainty surrounded the differentials. Cranston informed CMPA that he had his own attorney, Mr. Weatherwax. The Association official told Cranston that they would like to check the attorney out as to his reputation since the Association was concerned that both sides should be well represented by competent attorneys. CMPA's official position favors the differentials, and a majority of its members receive them; CMPA's counsel represents defendant-interveners. CMPA officials, plaintiffs, and plaintiffs' attorney met once prior to the filing of this action.

4. Neither defendant nor defendants' counsel knew that this suit would be instituted prior to its actual institution, nor did they have any contact with plaintiffs or plaintiffs' counsel prior to the institution of this action.

5. CMPA at no time has influenced, attempted to influence or in any way affected or controlled plaintiffs' conduct of this action. Nor have defendant-interveners or defendant attempted to exercise control over or influence plaintiffs' conduct of this suit.

6. Plaintiffs and defendant interveners have faithfully, earnestly and forthrightly represented the interests of their respective classes. The attorneys for each class have likewise acted in a thoroughly professional and expert manner. The entire record indicates that this action has been conducted as an adversary proceeding on the highest level. In short, plaintiffs and defendant-interveners have more than fairly and adequately represented the members of their respective classes.

7. The complaint, filed on February 9, 1967, alleges the invalidity, on several grounds, of an action of the Secretary of Agriculture in promulgating the aforementioned provision in the Connecticut Order under the authority contained in the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*

8. The challenged order provision results in producers whose farms are located in two specified geographical areas receiving a differential over and above the uniform price for milk of 46¢ and 23¢ per hundredweight, respectively, for their milk which is priced under the Order depending upon the designated area in which their farms are located. The Order describes the marketing area as follows:

> "§1015.2 Connecticut marketing area.
>
> 'Connecticut marketing area', referred to in this part as the 'marketing area', means all territory within the State of Connecticut, together with all waterfront facilities connected therewith and craft moored thereat, and all territory therein occupied by government (municipal, State or Federal) installations, institutions or other establishments."

The Order sets forth the provisions relating to the farm location differentials, including the areas affected, as follows:

> "1015.72 Farm location differentials.
>
> (a) In making payments to producers for milk received from a farm located in Connecticut, Rhode

Island, in that portion of New York State east of the Hudson River and south of the Berkshire Section of the New York State Thruway, or in that portion of Massachusetts south of the Massachusetts Turnpike, there shall be added 46 cents per hundredweight.

(b) In making payments to producers for milk received from a farm located outside the area described in paragraph (a) of this section, but within that portion of New York State east of the Hudson River and south of the northern boundaries of North Greenbush, Sand Lake, and Stephentown townships in Rensselaer County, and within that portion of Berkshire County, Massachusetts north of the Massachusetts Turnpike, there shall be added 23 cents per hundredweight."

9. In accordance with the provisions of the Act, the Secretary of Agriculture promulgated the Connecticut Milk Order, including the challenged provision partially effective on March 1, 1959, and fully effective April 1, 1959, following notice, public hearing, findings based on the evidence introduced at the hearing, and a favorable referendum among producers supplying the proposed marketing area.

10. The Final Decision published by the Secretary incident to the promulgation of the Order on February 11, 1959, discloses that the Secretary included the "farm location differential" provisions under his authority to make adjustments to the uniform producer price contained in Section 608c(5)(B)(ii) of the Act as an adjustment for "market differentials customarily applied by handlers."

11. The Secretary of Agriculture, in subsequent findings based on evidence adduced at subsequent public hearings, reaffirmed and rejustified his original findings in February 1959, with respect to the economic necessity for and the validity of the "farm location differential" provisions in the Connecticut Milk Marketing Order.

12. Where the circumstances warranted it, the Secretary of Agriculture has included provisions in other marketing

orders for preferential payments to producers based solely on the location of their farms nearby the market.

13. Federal price regulation of milk was first authorized by the Agricultural Adjustment Act of 1933. This Act provided for marketing agreements and for the issuance of licenses by the Secretary of Agriculture regulating the pricing of milk to producers by handlers. Pursuant to this authority, the Secretary of Agriculture issued many licenses regulating the handling and pricing of milk throughout the United States in the areas described in the licenses.

14. Among the stated purposes of the amendments to the Agricultural Adjustment Act in 1935, as they affected milk, were those which were designed to reinforce the existing practices of cooperative associations and to carry forward the methods employed under licenses issued pursuant to the 1933 Act. They were also intended to adopt the present practices of business. These amendments, among others, provided for the adjustments to the uniform producer price for "volume, market and production differentials customarily applied by handlers."

15. Prior to 1933, cooperative associations, as a part of their voluntary methods of pricing milk to producers, gave preferential treatment to nearby producers. This practice was also reflected in the licenses issued under the Agricultural Adjustment Act of 1933. The practice of giving preferential price treatment to producers whose farms were located nearby the market was carried over in some orders issued following the 1935 amendments.

16. The Agricultural Marketing Agreement Act of 1937, re-enacted the provisions, as they affected milk marketing orders, of the 1935 amendments to the Agricultural Adjustment Act. Section 4 of the 1937 Act expressly validated existing orders, regulations issued pursuant thereto, and the acts of the Secretary in connection with licenses and orders issued under the AAA. The Conference Committee Report incident to the amendatory legislation ex-

pressly stated that Section 4 was to remove all doubts about the validity of actions of the Secretary as reflected in existing orders.

17. The draftsmen of the language of Section 608c-(5)(B)(ii) considered the terms "volume, market and production differentials customarily applied by handlers" as embracing the existing practices of cooperatives and the existing methods in licenses which gave recognition to many and varied differentials which could be described as associated with the words, "volume", "marketing" and "production" practices.

18. There were in existence in the various marketing areas in 1935 many different differentials which could be described as based upon or associated with "volume", "market", and "production".

19. The language in the Committee Reports dealing with marketing orders which accompanied the AAA of 1935, when read in its entirety discloses that, in order to reinforce the many and varied existing practices of cooperative associations and the methods employed in licenses in pricing producer milk, the words of "volume", "market", and "production" as used to describe differentials in Section 608c(5)(B)(ii) were descriptive of types of differentials.

20. Among the existing differentials practiced by cooperatives and methods employed in licenses were those which gave preferential price treatment to producers based upon the location of their farms nearby the market. This type of differential is within the category of "market differentials customarily applied by handlers".

21. There has been no showing by plaintiffs that the differentials established by Section 1015.72(a) and (b) prohibit the movement of their milk into the Connecticut Marketing Area or that such differentials otherwise constitute a "trade barrier" within the meaning of Section 608c(5)(G) of the Act.

22. The administrative record contains evidence sufficiently substantial to justify the Secretary's promulgation of a nearby differential in his Connecticut order.

CONCLUSIONS OF LAW

1. This is an adversary action presenting justiciable issues over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1331(a), 1337, 2201-2, 5 U.S.C. § 701-6 and 7 U.S.C. § 601 *et seq.*

Venue is properly laid in this District pursuant to 28 U.S.C. § 1391(e).

2. This is a proper class action pursuant to Rule 23(a) and (b)(1)(B), Fed. R. Civ. P., with respect to plaintiffs' and defendant-interveners' classes as set forth in this Court's orders of October 20, 1967.

3. The farm location differentials contained in Sections 1015.72(a) and (b) of the Order regulating the handling of milk in the Connecticut Marketing Area, 7 C.F.R. § 1015 (1968), are market differentials customarily paid by handlers subject to the Order and as such are authorized pursuant to Section 608c(5)(B) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601, *et seq.*

4. The farm location differentials are not "trade barriers" and do not violate Section 608c(5)(G) of the Act.

5. The farm location differentials are not unconstitutionally discriminatory.

6. The Secretary's findings with respect to the inclusion of the farm location differentials in the Connecticut Order is supported by substantial evidence in the administrative record.

Dated at Albany, New York, this 2nd day of August, 1968.

/s/ WM. H. TIMBERS
William H. Timbers
United States District Judge
Sitting by designation.